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CONVEYANCER'S NOTEBOOK.

Frustration of contract—Law Reform (Frustrated Contracts) Act, 1943.—Since even a building lease cannot in law be frustrated (*Leighton's Investment Trusts* v. *Cricklewood, etc., Trust, Ltd.*, 59 T. L. R. 27 (*ante*, p. 50)) the Law Reform (Frustrated Contracts) Act, 1943, does not concern conveyancers as much as the layman might expect. At least, we presume that the words in section 1 (1), "has become impossible of performance or been otherwise frustrated", are to be interpreted as frustrated in point of law and not in point of fact. The case just cited was one in which the agreement to build in fact became impossible, but this did not entitle the builders to resist an action for rent. The purpose of the Act appears to be to modify the old rule that in frustration the loss lies exactly where it falls. The parties are to make an equitable return of money paid where services are not rendered and to pay an equitable sum in respect of any benefit received prior to frustration. The Act does not apply to any charterparty except a time charterparty or a charterparty by way of demise nor to any contract (other than a charterparty) of carriage by sea, nor to any insurance nor to any contract of sale and delivery of specific goods which have perished, nor so far as the contract otherwise provides.

Section 2 (2) contains one rather interesting provision. It enacts that the Act is to apply to a contract to which the Crown is a party "in like manner as to contracts between subjects". Speaking generally, the law affecting contracts to which the Crown is a party is highly eccentric. The interesting question arises whether the law ceases to be eccentric so soon as the contract (if, indeed, it can properly be so called) is frustrated within the provisions of the Act. If that is so, can the Crown now be sued directly? It is thought that this is not the result of the sub-section, but the eccentricity of the existing law *vis-à-vis* the Crown will be read into this sub-section. Since any man is supposed to be able to understand a statute, the clarity of this provision does not commend itself.

Another important, though clearly reasonable, principle requires a party to a contract to discharge the expenses of any benefit obtained by a person not a party to the contract if the party to the contract

had by the contract assumed obligations under the contract in consideration of the benefit being conferred : section 1 (6).

Sales of war-damaged property.—In the Law Society's *Gazette* for October, 1943, attention is again called to the danger of negotiating sales of war-damaged property. It by no means follows that the vendor will get a value payment even though the property is " flattened out ". Consequently, it is unwise to sell at a low valuation upon the expectation of such a payment.

The advice given in the *Gazette* is that vendors, whenever possible, should wait before selling for the determination of the War Damage Commission. If that is not possible a provisional contract should be entered into to assign any value payment. This would require the approval of the War Damage Commission. The note also remarks that considerations governing the desirability of notices of retention or disclaimer under the Landlord and Tenant (War Damage) Acts are similar.

Restriction of Ribbon Development (Temporary Development) Act, 1943.—This Act controls the question of consent to ribbon development that is intended to last only during " the present war period ". The " present war period " began on September 3, 1939, and will cease on such date as His Majesty may in Council appoint. If, prior to the Act, any consent to such ribbon development was given subject to the condition that any building, etc., made under the consent should be subsequently removed, then the Act is deemed to have applied instead : section 1 (4). This also applies where the highway authority had entered into an agreement not to prosecute under the Principal Act.

The effect is that where it is " expedient in the public interest " to permit a *temporary* infringement, consent to ribbon development should be refused but notice served stating that no action will be taken under section 11 of the Principal Act until after the expiration of the present war period. Similarly, if consent had not been applied for but a contravention had been made of the restriction a similar notice can be served. The effect in either case is to prevent all criminal proceedings and to prevent the highway authority from removing the building, etc., until after the expiration of the war period.

Coal Act, 1943.—The new Coal Act vies with financial legislation for incomprehensibility as legislation by reference. It seems that where a Government Department is primarily concerned in administering the law it cannot think in terms of repeal and new legislation but only in amendment, not infrequently upon amendment. This may be due to the general principle that a Government Department does not like to admit that it was wrong, that is, that the original Act drafted under its auspices needs other than additions, but whatever the reason

the habit is pernicious in the extreme. Actually most of this particular Act is by way of extension of the provisions of the Principal Act, to fill up gaps which experience has dictated need to be filled. As a result it is bits and pieces and not very suitable to a short note.

Some of the provisions are that (section 1) "retained interests" may include interests of persons who were not carrying on the business of coal mining but were carrying away minerals or other substances other than coal; section 2 preserves certain rents for underground wayleaves where prior to the vesting date coal was in different ownership from the wayleave but by reason of the vesting the ownership had become unified; sections 5 and 6 modify stamp duties, so that persons to whom regrants of what had been their coal are made need not pay stamp duty on the grant nor, indeed, where the regrant is made for purposes other than coal mining; section 9 gives power to the Commission and to the Minister to extend the time notwithstanding that the period has elapsed or the date has already passed.

Two other matters call for slightly more detailed attention. Under section 11 provision is made to protect rights of support which, prior to the Coal Act, had been safeguarded in the lease of coal by requiring the consent of the freeholder (also the surface owner) to working coal. This coal is, in the Act, called "restricted coal". By the Second Schedule, rules are worked out by which the Commission may grant the licence to work the coal subject to paying compensation to the surface owner for subsidence or reinstating the surface. Among other provisions the Schedule enacts that any questions as to the subsistence of an obligation under its provisions to pay compensation or as to the rights or liabilities of any person in respect of the enforcement of an obligation so subsisting shall be determined by arbitration (paragraph 3). One is tempted to wonder whether arbitrations are named because they are so much less public than ordinary litigation. Most of these questions must surely involve legal questions of a most abstruse character, and it is difficult to see why any tribunal should be better fitted for this purpose than the High Court of Justice. If the parties wish to submit the matter to arbitration they can always agree to do so. It is, in our submission, a most undesirable provision in an Act of Parliament compelling the parties to submit t[illegible] particularly where one of those parties is a Government Department whose acts should always be scrutinised in the fullest possible glare of publicity.

Section 4 (supported by the First Schedule, which in the King's Printer's copy refers to section 5) provides new rules for freeholders who wish to work what was their coal. It is entitled a "freeholder's lease" and lives up to its name. This lease can only be granted for "an amount equal to the compensation payable under section six of the principal Act". When so granted it is to be at a peppercorn rent and "for such term, commencing on the vesting date, as the person entitled to the lease may require, not being longer as regards the coal comprised therein than may be reasonably requisite for enabling that coal to be worked out". Presumably if the person entitled to the freeholder's lease required a term which the Commission declined to grant on the ground that the period was too long the freeholder could apply to the Court for a declaration that the term was "reasonably requisite for enabling" the coal to be worked out. It would be a pretty

problem. But if the freeholder takes too short a term presumably he loses the residue of the coal. At least that is a point that subsequently someone may wish to know. It is assumed that the Act does not contemplate a term " for so long as may be reasonably requisite for enabling the coal hereby demised to be worked out ". Such a term would be only an equitable term under the Law of Property Act, 1925. Alternatively, the manner in which a legal term could be granted effectively would be for, say, 1,000 years, subject to notice so soon as the time reasonably requisite had expired—but this would require careful drafting. We are not sure that such a method would be valid within the section.

The lease is also to " be subject to such conditions, not inconsistent with the provisions of this subsection, as will, having regard to those provisions, be not more onerous to the lessee than the conditions to which a person not entitled to the benefit of the said section thirteen (the section in the principal Act entitling the freeholder to a lease) might reasonably have been expected to agree if taking a lease of the same premises for the same term at the same rent in consideration of a premium representing the capitalised value of the best rent that could reasonably be obtained by the lessor without any fine or premium ". If and when any one of His Majesty's Judges has to determine what these conditions are, we feel that he will not be envied. Apart from that, the interesting effect of the Act appears to be as follows. For the minerals which were his to be worked on his own terms, the freeholder will now pay all the compensation value to work them on someone else's terms. As a forecast of what planning will become we anticipate that it is not likely to encourage the property owner to welcome planning. Let us hasten to say that this is not a criticism of the view that planning is necessary, but we do think that perhaps a little more regard might be had to fundamental principles of law when this legislation is drafted. If new interests are necessary or convenient then let them be created clearly and definitely as something new.

One of the difficulties about this type of legislation is that it belongs in fact to a class for which we believe a Government Department is rarely responsible. It is not concerned with the creation of new rights and liabilities out of the blue, such as pension rights, workmen's compensation and similar claims in the nature of property; nor is it just concerned with the taxation of existing property rights—a topic on which the maze of legislation indicates some confusion of mind—but it operates to deal with some highly intricate Common Law and not completely to overturn it but to apply it. Property law is generally regarded as a life work by most lawyers, and Government Departments, as a rule, require much more all-round knowledge for their legal staff. We can only hope that this will be borne in mind when the much more complicated problems of general planning and acquisition are to be dealt with by legislation. We prophesy that conveyancers are in for rather a bad time unless some marked changes take place in the approach to the problems of new or varied property rights.

The Sixth Schedule to the Finance Act, 1943, is designed to deal with a flaw in the anti-tax avoidance legislation disclosed by *Herbert* v. *C. I. R.*, [1943] W. N. 52. It was there held that section 38 (2) of the Finance Act, 1938 (which is concerned with revocable settlements of certain types), could not be applied in a case in which there were two or more settlors. Where a settlement is caught by section 38 (2), the income arising under the settlement is to be treated, for tax purposes, as the income of the settlor and not of any other person. But the same income cannot be treated both as the income of A and of no one else and also as the income of B and of no one else, nor can it be for the Revenue authorities to select one of the two as the victim. Hence the decision in *Herbert's Case*, above, and the remedial legislation. The same question can arise under other provisions of Part IV of the Finance Act, 1938, under section 21 of the Finance Act, 1936, and under section 20 of the Finance Act, 1922. The Sixth Schedule to the Finance Act, 1943, deals with the application of all these enactments to settlements and dispositions where there is more than one settlor or disponor. The Schedule is related to section 20 of the Act, which is enacted in a declaratory form for the removal of doubts.

So far as the 1938 Act is concerned, the effect of the 1943 legislation is that, where there are two or more settlors, income caught by any of the provisions of Part IV is to be split up among the settlors on the principles explained below, and to the extent of the income attributed to any particular settlor those provisions will apply to him as though he were the only settlor.

There is to be attributed to each settlor so much, and so much only, of the property comprised in a settlement as is property originating from him, and so much, and so much only, of the income arising under a settlement as is income originating from him. The property to be treated as originating from a settlor is property directly or indirectly provided by him for the purposes of the settlement and property representing property so provided. Where property of the latter class forms part of a larger item of property, there must be a just apportionment. The income to be treated as originating from a particular settlor is income from property originating from that settlor and income directly or indirectly provided by him. Notional income representing undistributed profits of a privately controlled company, which have been the subject of a direction under the companies surtax legislation, is to be attributed to a settlor to the extent to which the corresponding interest in the company represents property comprised in the settlement and originating from that particular settlor.

Where questions arise under section 38 (1) or section 39 of the 1938 Act as to annual payments, the payments to be considered are limited, in the case of each settlor, to payments made, or falling to be made, by that settlor.

Questions may arise as to whether, and to what extent, income arising under a settlement has been distributed. Where payments have been made partly out of income originating from a particular settlor and partly out of other income, those payments, unless otherwise

apportioned by the terms of the settlement, are to be apportioned evenly over the whole of the income which has been drawn upon.

Section 21 of the 1936 Act and section 20 of the 1922 Act are dealt with, *mutatis mutandis*, on precisely similar principles.

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Land Charges.—The local Land Charges (Amendment) Rules, 1943 (S. R. & O., No. 1532) were issued on October 23. An explanatory note says :—" The principal object of these Rules is to make provision for the registration as local land charges of the resolutions to prepare a planning scheme under the Town and Country Planning Act, 1932, which, by virtue of section 1 of the Town and Country Planning (Interim Development) Act, 1943, were deemed to have been passed by certain local authorities on the 22nd October, 1943.

" Resolutions to prepare or adopt a scheme, and also the schemes themselves, are registerable as local charges under section 15 of the Land Charges Act, 1925, as amended. Provision is made for the method of registration by the Local Land Charges Rules, 1934. It is now necessary to make special provision for the registration of the " deemed resolutions " under section 1 of the Town and Country Planning (Interim Development) Act, 1943, and the accompanying Rules make the amendments in the principal Rules of 1934 requisite for this purpose.

" Certain minor amendments consequential on the passing of the recent Act, are also made in the principal Rules.

" For the convenience of the public, it is proposed, as soon as practicable, to issue consolidated Local Land Charges Rules in which the amendments made to the principal Rules by the amending Rules made in 1938 and 1942, as well as by these Rules, will be embodied."

THE REPORT OF THE LAND TRANSFER COMMITTEE.

The report of this Committee just issued by H.M. Stationery Office (price 2d.) is a thoroughly English document since it contains compensations for all except those who wished for a thorough-going job to be made of Land Registration.

Compulsory registration is naturally not to be extended until after the war nor until a reasonable period of time has elapsed after the termination of hostilities for sufficient staff to become available both for the purposes of the Land Registry itself and for those solicitors who would have business in the Registry (paragraph 6). This has all the appearance of sidetracking the whole issue and enabling the profession once again to rest peacefully in its bed, and makes no real effort to master the principles of land registration.

The Committee is also of opinion that compulsory registration should be limited to change of ownership on sale (paras. 7 and 8). No registration by blocks is regarded as economically or otherwise possible at any one moment of time. This recommendation excludes

the more valuable uses to which registration of title could be put, as, for example, the final determination of boundary rights and of all incorporeal hereditaments over dominant and servient tenements, thus making both practicable and natural the abolition of adverse possession and prescription. Such a real simplification of some of the most litigious problems of the land law may not have been dealt with in evidence. One of the greatest benefits apparently claimed for the limitation of compulsory registration to sales is that the investigation of title is done mainly by the applicant's solicitor and so the Land Registry is saved from the task in most cases. A remarkable example of the official having it both ways.

Subject to these two recommendations, which appear somewhat to reduce the effectiveness of the Report, the Committee recommend that "compulsory registration on sale must proceed by stages, but that it can and should proceed by much quicker stages than heretofore" (paragraph 9). The five years of the Scott Committee is definitely abandoned (paragraphs 4 and 5).

In order to facilitate and expedite compulsory registration, the Minister [at present Lord Woolton] concerned with post-war development is to be consulted to discover in which areas development is first likely to begin (paragraph 11). Judging from the speed with which Parliament is being presented with plans for post-war development this again should help to satisfy the opponents of registration. Prior consultation with the Ordnance Survey Department is also recommended (paragraph 12), and where there is a choice the areas selected should have such a density of population as has been found in the past to provide enough business to cover the cost of registration in those areas. But these considerations are not to dictate the programme. "The object would be to introduce compulsory registration as quickly as possible in the areas which are being or are to be developed."

Apparently also to expedite and facilitate registration the Chief Registrar is recommended to consider how far, if at all, the rules for investigation of title should be relaxed further on a report of the solicitor accepting the title on purchase (paragraph 13). He should report on this question to the Rule Committee in order that they may consider the question whether any such relaxation can be embodied in the Rules. It will be recollected that the Rules have the same statutory force as the Act.

It is further recommended that District Registries should be set up as branches of the Principal Registry (paragraph 15). The number of such registries was left undefined, but a suggestion was put forward that they should cover an area of four to five million inhabitants (paragraph 14). It was also suggested that the register should be kept in duplicate; a suggestion caused by the experience of the Registry which has been twice hit by bombs, though the register has not been damaged.

The general effect of the Report is the ground plan of a conservative recommendation for the extension of registered conveyancing. It is, indeed, almost the best that the Committee could have done, since they were not entitled under their terms of reference to express a view on the merits of transfer by registration (paragraph 3). Nevertheless, the Committee did say, perhaps the more remarkably in

view of the conservative character of the recommendations, that none of the evidence which they heard as a matter of courtesy and convenience "led them to the view that there were any material defects in the system of transfer by registration" (paragraph 3). To this exalted claim we will return.

Whether such a conservative viewpoint will lead the powers that be to the view that the whole matter should be shelved remains to be seen. But, unless the Committee is ignored, the effect of its recommendations are such that the Land Registration Act will fall outside the scheme for post-war planning of land. It might seem obvious to anyone unfamiliar with Departmental jealousies that with the project of "total planning" legislation would have been introduced whereby the system of registration would be linked with that of planning. It seems highly unlikely that any system of planning will abolish the provisions of the Town and Country Planning Act, 1932, s. 7 (6), requiring the framers of a "scheme" to compile a "register of owners" (see section 53). From the point of view of forward planning, to know what was owned and by whom might be even more advantageous. If the recommendations of the Committee are followed, the Land Registry can play no part and the profession will be faced in due time with two Registers, one kept by the officials of the Ministry of Planning and the other by the officials of the Land Registry. There seems to be ample scope for confusion.

This disregard for the possibilities under planning may seem the more peculiar because the recommendations include the following: (a) "Land acquired by the State, whether wanted for public purposes or approved private development, should be registered in whatever area it lies"; (b) "an obligation to register title on purchase should be laid on all local authorities purchasing land for any purpose". It will be observed that interests in the land may subsequently come into private hands in either of these cases.

There are some incidental matters that are contained in the Report that call for comment. The first was a suggestion that voluntary registration should cease. We confess to being intrigued to know from what quarter that suggestion emanated. The Committee were not convinced by the arguments. In their opinion, voluntary registration will be of the greatest assistance to those engaged in developing building estates and, as they were informed, would be welcomed and encouraged by building societies. They were also of opinion that in non-compulsory areas the process of voluntary registration provided a useful way of accustoming solicitors and the public generally to the system. The interesting part of this view is the dogmatic assertion that registered conveyancing is "of the greatest assistance" to the development of building estates. In point of fact, two views on this point have been held by practitioners equally familiar with both registered and unregistered conveyancing. In registered conveyancing the tremendous reliance on the filed plan in the case of rapid development is by no means an unmixed blessing. Unless the plan is fixed once for all the system demands a liaison with officialdom that is not always convenient.

Perhaps equally interesting, though less surprising, is the omission of the most valuable feature of voluntary registration. Many

solicitors and certainly some conveyancing counsel advise that where there is an inconvenient and troublesome title, though not really bad, much further trouble and expense is saved by registration. In nearly every case of this kind the Registry quite properly grant an absolute title. The inconvenient though technical defect is thus removed. It is believed that this use of the Registry is not very popular with the Registry officials, but since the Register exists to cheapen and facilitate land transfer surely it is entirely laudable. We certainly hope that voluntary registrations will not be discontinued.

It was also suggested that the registration system was unsuitable for application to particular areas either because of special types of tenure or of property. We, in our ignorance, thought that all land was now held by the tenure of free and common socage, but the Report refers to the chief rent system in Lancashire and other parts of the country as, apparently, a special form of tenure. For special types of property mention is made of land containing mines and minerals and the difficulty of boundaries in rural areas. In all these cases the Committee was of opinion that the difficulties equally exist in unregistered conveyancing. If, by chief rent system is meant the system of granting freehold in consideration of a rentcharge, which certainly does obtain in Manchester and other parts of the country, we should have said that if the Register is properly operated all the benefits, if any, of registered conveyancing apply as much to this as any other type of conveyance. Indeed, if the original transfer were to contain a covenant by the grantee of the rentcharge and by the grantee of the land respectively to permit the covenantee and his successors in title to inspect the register respectively of the land or of the rentcharge it might even facilitate the remedies of the owner of the rentcharge and ensure the owner of the land paying to the legal owner of the rentcharge. It is submitted that such a covenant should run with the land at law, and possibly apart from it there would be a right to inspect the register. The position of covenants running with a rentcharge is more difficult: *Grant* v. *Edmondson*, [1931] 1 Ch. 1.

So far as boundaries are concerned, the present position is that general boundaries only are shown unless there is a special survey and notices on first registration, etc., or otherwise the Registry is satisfied and notes the fixed boundaries. This will remain so long as registration is piecemeal, because of the expense entailed.

With regard to mines and minerals, however, it is suggested that the proviso to section 120 should be repealed in so far as it excludes a sale of mines and minerals separate from the surface. This suggestion follows a general observation (paragraph 17) that "it may well be that there are improvements in the details of the system as now practised which could be introduced with advantage". This expression of opinion should be set opposite the earlier expressed view that there was no evidence before the Committee of "any material defects in the system of transfer by registration".

As the Committee offered hardly any illustrations of the improvements that might well be made it is not possible to define exactly what would be connoted by "detail". In his *Principles of Land Registration* Sir John Stewart-Wallace admitted that the subject of "overriding interests" represented a flaw in the system of

registration, though in his opinion their existence was then justified by convenience. Whether "overriding interests" are a "detail" we do not know, but that they are a "material defect" is self-evident. We do not suggest that the problems of overriding interests are greater for the conveyancer dealing with registered land than those presented by the analogous interests in unregistered land. Apart from certain unnecessary uncertainties, which may be details susceptible of improvement, we do not think they are. But so long as overriding interests bind the legal estate but are not registrable a considerable part of registered conveyancing, even as it affects registrable interests, will in fact have to conform to unregistered conveyancing as well. This is both unreasonable and unnecessary, as a study of the cognate systems now in force in the Dominions would disclose.

In our opinion, the uncertainties which enshroud some of the overriding interests are brilliant daylight compared with the difficulties involved in the topic of "minor interests". This may, of course, be another detail, and it is true that in practice most of the difficulties do not usually arise, and if they do they are in fact ignored. Nevertheless, if we are to turn from that imposing edifice of finely drawn distinctions and meticulously defined principles, the system of real property and conveyancing at Common Law, there is at least something to be said in favour of trying to make the new system not less technically perfect.

In all humility, then, we suggest that if this Report is to be taken seriously at all and if, after the war, the extension of compulsory registration is to be expedited and facilitated, it is high time that the Lord Chancellor appointed a Committee to consider what reforms should be made in the Land Registration Act and Rules before the system is further extended. If this is done it is to be hoped that the Committee will cast its net as widely as possible and make every effort to get all evidence possible from those who, by study and practice, have had to examine the defects in the present system.

CONDITIONS IN RESTRAINT OF RELIGION.

A Postscript.

By BERTRAM B. BENAS, B.A., LL.B., of the Middle Temple, Barrister-at-Law.

Since my article entitled "Conditions in Restraint of Religion" was published in the September number, the case of *Re Donn, Donn* v. *Moses* has been reported in [1943] 2 A. E. R. 564. In this case the testator provided that "if any of his children should intermarry with anyone not of the Jewish faith, or, if any child of his should intermarry with anyone whose parents were not of the Jewish faith at the time of the person so intermarrying with any child of his, or, if any such last-mentioned person at any time previous to such marriage have been of any faith other than the Jewish faith, then in such case during the life

of such child one-half of the income of his or her share shall follow the trusts then and thereafter subsisting of the income of the shares of residue of his other children in equal shares ". The trustee took out a summons to determine whether the forfeiture clause in the testator's will was wholly or partly invalid for uncertainty or otherwise. Uthwatt, J., held that it was not possible to extract what the testator meant by the words " Jewish faith ". The condition was therefore void for uncertainty. His Lordship observed (at p. 567), that he could not get from the material clause " any reason for thinking that a test of the degree of adherence to the Jewish faith has been supplied by the testator in his will. If that be so, on the footing of the decision in *Re Blaiberg*, [1940] 1 Ch. 385, and my acceptance of the *dicta* of the majority of the House of Lords in *Clayton's Case* (*Clayton* v. *Ramsden*, [1943] A. C. 320), I think this condition is void for uncertainty and I so declare ". If there was an appeal from this case there would be an opportunity for a review of the whole position untrammelled by the difficulties which presented themselves in *Clayton* v. *Ramsden* (*supra*), where the material clause referred both to " Jewish parentage " as well as " Jewish faith ". The position of the cases in relation to each other is somewhat peculiar. It will be recalled that when *Clayton* v. *Ramsden* was in the Court of Appeal (*sub nom. Re Samuel, Jacobs* v. *Ramsden*, [1941] 3 A. E. R. 196) Lord Greene, M.R., observed (at p. 213) that " the decision of Morton, J., in *Blaiberg's Case* is a decision which, in my opinion, cannot stand with the decision which should be given in the present case ", and as regards the words " of the Jewish faith " contained in the will in question his Lordship, delivering the judgment of the Court, held that they were not too vague to be considered and that the forfeiture clause was valid. When the case reached the House of Lords the decision turned on the phrase " Jewish parentage " and, as Uthwatt, J., emphasised explicitly in *Re Donn* (*supra*, at p. 566), the statements in the House of Lords relating to the phrase " of the Jewish faith " " are *dicta* and as such not binding, but I am bound to pay all respect to them ". None the less it is respectfully submitted they are purely *obiter* and it would seem that the effect of *Re Donn* is not so much to cause a resurrection of the authority of *Re Blaiberg* (*supra*), as to restate by incorporation the *ratio decidendi* of Morton, J., in *Re Blaiberg* and to be a new opening of the subject, an envisagement of the position which seems, on principle, more supportable than that of reviving *per se Re Blaiberg*, which was overruled by *Re Samuel* (*supra*) in the Court of Appeal, or of regarding the *dicta* in *Clayton* v. *Ramsden* (*supra*) as decisive. An appeal would be of interest in a case relating to Christians or adherents of Islam for as to each it would appear that the question of the " test of the degree of adherence " should on the reasoning of *Re Donn* be equally material, since there is more than one form of each of such faiths. Conveyancers, it would seem, must for the present keep *Re Donn* steadily in view and frame " Conditions in Restraint of Religion " according to the phrase of the learned Master of the Rolls, with due regard thereto, and it is hoped that the references as to the methods available, indicated on pp. 12 and 13 hereof, to meet the difficulty may be of some service.

FAMILY ARRANGEMENTS.

By BERTRAM B. BENAS, B.A., LL.B., of the Middle Temple, Barrister-at-Law.

A Family Arrangement is thus aptly described in an elementary work forming a short introduction to *Equity Case Law* founded on White and Tudor's selection (*Leading Equity Cases*—Kelke, 3rd ed., p. 132): "'Family Arrangement' is an elastic expression for every instrument (generally under seal) by which there is any adjustment as between different members of one family of their actual or expectant rights in or over family property real or personal, settled or unsettled. It may be between father, mother, and children, or may be between brothers or sisters, or other relations. It often, but not always, involves some compromise. Every disentailing assurance, and every resettlement is of this nature; in these there is usually (not compromise but) abandonment by tenant in tail of his rights as such and acceptance of tenancy for life with some further consideration, *e.g.*, rent charge. In other cases, especially between brothers or sisters, there is oftener actual compromise."

From the case of *Stapilton* v. *Stapilton* (1739), 1 Atk. 2, it was observed in *Westby* v. *Westby* (1842), 2 Dr. & War. 502, that down to that date the current of authorities had been uniform and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially where those doubts have related to a question of legitimacy) and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by the Court, albeit resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers. The Court will be glad to lay hold of any just ground to carry such an arrangement into execution and to establish the peace of the family (see *Stapilton* v. *Stapilton*, *supra*, *passim*). Even if the claim is bad, as for instance, so unsustainable as a claim depending on the validity of a marriage with a deceased wife's sister when such a marriage was illegal (see hereon *Westby* v. *Westby*, *supra*), this consideration is sufficient provided that the claim is a real one and is made in good faith (see *Neale* v. *Neale*, 1 Keen 672; *Stewart* v. *Stewart*, 6 Cl. and Fin. 911, and *Cook* v. *Wright*, 1 B. & S. 559). The principle of these earlier cases has been maintained by the Courts with consistent regularity (see *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200), and it may be stated generally that Family Arrangements continue to remain among those transactions which the Courts view with favour.

It has been stated that the enforcement of a Family Arrangement to divide property expectant by one or more of the parties in the case of a will depends upon the principle that where a testator desires his beneficiary to have the personal enjoyment of his bounty, it is within his power to stint the enjoyment by restraining him from aliening the subject of the gift, and, if he does not do so it is presumed that he intended that the beneficiary should have the full enjoyment of the property, that is to dispose of it at will. (See *Beckley* v. *Newland*, 2

P. Wms. 182; *Wethered* v. *Wethered*, 2 Sim. 183, and *Higgins* v. *Hill*, 56 L. T. 426.) An agreement by way of Family Arrangements requires but very slight consideration for its support, and in order to set aside such an arrangement on the ground of insufficient consideration the insufficiency must be so gross as to warrant the conclusion that the complainant party either did not understand the arrangement in which he participated or was the victim of imposition. (See *Tennent* v. *Tennents*, L. R. 2 H. L. (Sc.) 6.) To render a Family Arrangement binding there must be an honest disclosure, by each of the parties to the other, of all such material facts within their knowledge relative to their rights and title as are calculated to influence the judgment in its adoption, and any advantage taken of the known ignorance of the complainant party of such facts renders such an arrangement void (see *Smith* v. *Pincombe*, 3 M. & G. 653; *Greenwood* v. *Greenwood*, 2 De G. & S. 28, and *Brooke* v. *Lord Mostyn*, 2 De G. J. & S. 373). It is not the mere fact of the ignorance of the party which invalidates the arrangement but the fact that such a party has been misled as a consequence of such ignorance. The criterion as to validity in this behalf is the *bona fide* nature of the transaction. A *bona fide* mistake as to a party's rights or obligations is not of itself sufficient to enable such party to repudiate the arrangement, provided his participation has not been unfairly secured by the other party or parties thereto. (See *Dimsdale* v. *Dimsdale*, 3 Drew. 556; *Frank* v. *Frank*, 1 Cas. in Ch. 84, further dealt with in 15 Beav. 301; *Stewart* v. *Stewart*, *supra*, and *Lawton* v. *Campion*, 18 Beav. 87). The mistake or ignorance of a party is not material where such person was represented by an agent who was adequately informed. (See *Stewart* v. *Stewart*, *supra*.) Difficult questions can arise in respect of non-disclosure and as to such contracts constituted by Family Arrangements partaking of the nature of " contracts *uberrimæ fidei* ", see *Tennent* v. *Tennents* (*supra*). The broad principle was clearly stated by Lord Eldon in *Gordon* v. *Gordon*, 3 Swanst. 400, at p. 463, where he observed that when " family agreements have been fairly entered into without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement ". (See further hereon generally *Fane* v. *Fane*, L. R. 20 Eq. 698, and *Turner* v. *Green*, [1895] 2 Ch. 205.) In Edwards and Watmough on the *Law of Compromises and Family Arrangements* the resemblance of the latter to the former and the distinctions between the former where actual or imminent litigation obtains, and the latter where the question of litigation is more in the nature of a possibility than a probability, is discussed at length. (See pp. 19 *et seq*, and pp. 204—205.) Cases in either sphere are often helpful in relation to the other but the distinction between the spheres must be kept clearly in mind in the application of the judicial dicta contained therein.

The term Family Arrangements because of its simplicity and apparently non-technical character tends towards the comprehension within its ambit of cases which are not in the strict sense cases of Family Arrangement at all and therefore such cases must be differentiated from those which partake of the true nature of the negotiated trans-

actions technically called Family Arrangements as a term of art. In Edwards and Watmough, *supra* (at p. 214), it is observed that the jurisdiction of the Court in respect of infants has to be distinguished as between the cases on the one hand where there is no question of dispute or bargain and on the other those where the Court is asked to sanction on behalf of infants an extension of the administrative powers of trustees outside the limits assigned by the settlor. As observed by the learned editors of Wolstenholme and Cherry, *Conveyancing Statutes*, 12th ed., p. 1367, in the note to section 57 of the Trustee Act, 1925: "Before 1926, on salvage principles, certain transactions by trustees were authorised", notwithstanding the absence of any power for those purposes vested in the trustees by the trust instrument or by law, but "as a rule such applications failed", the jurisdiction being exercised only with the greatest caution (see *Re New*, [1901] 2 Ch. 534), but "after 1925, the question of salvage or no salvage is no longer the test, but whether 'in the opinion of the Court' the transaction is 'expedient'. *Semble*, the rights of beneficiaries may be varied under an arrangement considered for the benefit of all parties". Prior to the statutory enactment previously cited the Court had no jurisdiction to sanction a modification of the trusts on the mere ground that such modification was for the benefit of the infants: it was necessary to go further and show that an emergency or state of things not within the contemplation of the settlor had arisen. (Edwards and Watmough, *supra*, p. 214.) As a consequence of both the inherent and the statutory jurisdictions with which the Court is now endowed it is enabled to deal comprehensively with trusts concerning infants, having regard to all the circumstances of the case (*a*).

In *Re Wells*, [1903] 1 Ch. 848, Farwell, J., as he then was, held that the Court had the jurisdiction to approve on behalf of infants a scheme of Family Arrangement and the criterion of the Court for sanctioning a compromise in such cases is its satisfaction that such a compromise will be for the benefit of the infants. (See also *Brooke* v. *Mostyn*, *supra*.) Pecuniary interests are not the only matters considered by the Court in deciding as to the nature of a compromise, but regard is had as to what is for the benefit of the infant viewing the Family Arrangement as a whole and the position of the infant in respect of such a disposal of those hitherto existent difficulties which have given rise to the desire for Family Arrangement (see *Micholls* v. *Corbett*, 34 Beav. 376).

Resettlement is in essence a species of the genus Family Arrangement, but it has become so much part and parcel of the general law and practice of settlements that resettlement may be more usefully comprehended in relation to that special sphere of conveyancing. As to the terms of resettlement by father and son see the observations extracted from an opinion by Charles Butler, quoted at length in 3 *Dav. Prec. Conv.*, 2nd ed., p. 215, and at pp. 216—218; the principles governing the validity of Family Arrangements in such cases are expounded with reference to the judicial decisions relating thereto to date. Any transaction between father, tenant for life, and son, tenant in tail of property, entered into upon barring the entail, is looked upon

(*a*) See also the Settled Land and Trustee Acts (Courts' General Powers) Act, 1943, and the observations thereon in "Conveyancer's Notebook", pp. 2—4, *supra*.

in the nature of a Family Arrangement; and in such a case apparent inadequacy of consideration and the circumstance that the property is reversionary will have but little weight (see White and Tudor, Vol. II, 6th ed., by O. D. Tudor, p. 937). When a tenant for life assigns his equitable interest by way of Family Arrangement, not by way of security for payment of money advanced, the instrument by which the equitable interest is transferred is to be regarded as one of the instruments creating the settlement (S. L. A., 1925, s. 104 (11), replacing S. L. A., 1890, s. 4. The section is retrospective as regards the dates of assignments, sub-section (12) substantially replacing S. L. A., 1882, s. 50 (4)). As a result the tenant for life for the purposes of the S. L. A. in such a case is the beneficiary for the time being entitled to possession under the compound settlement thus constituted and accordingly is entitled to the legal estate and to the exercise of the powers vested in a tenant for life.

The employment by each party of the same person as solicitor in a matter of a Family Arrangement is not in itself a ground of objection to the fairness of the transaction (see hereon especially *Hoblyn* v. *Hoblyn, supra*). The Court has refused to set aside a compromise on a plaintiff's allegation of ignorance of his rights and lack of professional assistance where both parties employed the same solicitor. Acquiescence in the sole employment of the other party's solicitor will not be sufficient to enable a plaintiff to avoid the compromise without evidence of some advantage having been gained prejudicial to a plaintiff and against which professional advice might have acted as a safeguard. As an illustration proof could be tendered of advantage having been taken of ignorance through lack of education or of business knowledge or experience. Contracts and bargains of improvident character made by poor and ignorant persons acting without independent advice will be set aside in equity unless the other party satisfies the burden which is upon him to show that the transaction is fair and reasonable. Separate advice while accordingly not essential in a proper case may none the less be advisable, and in pursuance of such a course separate counsel can be instructed (see *Hoblyn* v. *Hoblyn, supra*).

It should be borne in mind that a Family Arrangement may be valid as to part of the property dealt with or as to some of the provisions alone (see *Dimsdale* v. *Dimsdale, supra,* and *Hoblyn* v. *Hoblyn, supra*). Reasonableness is a dominant element in estimating the soundness of a Family Arrangement. What is reasonable or unreasonable can only be decided having regard to the special circumstances of the case (see *Jenner* v. *Jenner*, 2 De G. F. & J. 359; *Hartopp* v. *Hartopp*, 21 Beav. 259, and *Hoghton* v. *Hoghton*, 15 Beav. 278).

An agreement entered into in pursuance of a Family Arrangement may be rectified if it does not express the real agreement (see *Ashurst* v. *Mill*, 7 Hare 502), but not if the terms in question have been acted upon for a long time without dispute (see *Bentley* v. *Mackay*, 15 Beav. 143). A Family Arrangement procured by undue influence will be set aside (see *Ellis* v. *Barker*, L. R. 7 Ch. 104). In addition to the cases cited the following may be usefully consulted in relation to applications to the Court:—*Gray* v. *Paul*, 46 L. J. Ch. 818; *Re Trenchard*, [1902] 1 Ch. 378; *Re Birchall*, 16 Ch. D. 41; *Norton* v.

Steinkopf, Kay 45; *Re Swain*, [1918] 1 Ch. 574; *Howe* v. *Robinson*, 34 Sol. J. 620; *Maynard* v. *Eaton*, L. R. 9 Ch. 414, and *Fadelle* v. *Bernard*, 19 W. R. 55. For the practice in respect of Chancery applications concerning infants in relation to compromises and Family Arrangements see the *Annual Practice*, 1941, "Additional Notes", sub-tit. "Persons under Disability—Infants".

When a Family Arrangement has been effected on the faith that all the named parties will execute and be bound by it the arrangement becomes inoperative if some only of the parties execute it (*Peto* v. *Peto*, 16 Sim. 590, and *Bolitho* v. *Hillyar*, 34 Beav. 180). To provide against this difficulty in conveyancing practice it is not uncommon to find a deed of Family Arrangement in which infants are parties, there being no application to the Court contemplated, framed on the footing that the infants shall execute the deed on attaining the age of twenty-one years. Until such execution the deed would be in no way binding upon such non-executing persons but for the inclusion of a declaration to the effect that the validity of the deed so far as regards the persons *sui juris* executing the deed shall not be in any way dependent upon or affected by the non-execution by any other person or persons. (For an illustrative Precedent see the *Conveyancer*, Vol. 5 (o.s.), pp. 547—553, and the several precedents in that series may be usefully referred to for instances of the scope of Family Arrangements—see in particular the volume referred to and the general index for additional instances.) There are a number of forms in *Edwards and Watmough* (*op. cit.*), in addition to some in the various series of Conveyancing Precedents. In all appropriate cases care should be taken to consider the advisability of including the clause contained in *The Conveyancer* above referred to relating to the declaration of intention that infants shall execute on attaining the age of twenty-one years without affecting the validity of the Family Arrangement as it stands because of non-execution prior thereto.

After viewing the subject of Family Arrangements from the standpoint of the needs of the conveyancer who is concerned with the framing of instruments in that behalf, the attitude of the equity draftsman in the course of his envisagement of the processes necessary to cancel or rectify or enforce such an arrangement claims consideration. Shortly stated it involves a review of the application of the relevant principles of Equity as well as the general law of Contract and thereon in particular *Kerr on Fraud and Mistake* and *on Injunctions*, *Banning on Settlements*, *Joshua Williams on Settlements*, *Fry on Specific Performance*, *Vaizey on Settlements*, *Simpson on Infants*, *Farwell on Powers*, *Lord St. Leonards' Handy Book on Property Law* and *Pollock on Contracts* may be usefully consulted, in addition to the articles in the encyclopædic series grouped around these topics, as well as the several textbooks on Equity generally. A compendious collection of cases with valuable notes thereon is contained in the commentary on *Williams* v. *Williams*, L. R. 2 Ch. 294, in *Brett's Leading Cases in Modern Equity*, and where the difficult questions which arise through the respective disabilities considered under the general category of lunacy call for attention reference should be made to the additional notes relating to the subject in the *Annual Practice*, as well as to the textbooks and articles in the encyclopædic works dealing therewith.

In *Kerr on Fraud and Mistake* (2nd ed., by the original writer of the textbook), in the chapter entitled "Mutual Mistake" (p. 514) it is aptly and epigrammatically observed that "Family Arrangements are governed by a special equity peculiar to themselves". A parallel comment is made by Sir Frederick Pollock in his *Principles of Contract* wherein (8th ed., at pp. 651—652), with a shoulder note "Family Arrangements exceptionally favoured", it is stated that "it must not be forgotten that the suspicion with which dealings between parents and children presumably still under parental influence are regarded by Courts of Equity is to a certain extent counteracted by the favour with which dispositions of the kind known as family arrangements are treated. In many cases a balance has to be struck between these partly conflicting presumptions". If these enunciations of the approach to Family Arrangements which obtains under the English Legal System are carefully borne in mind, they will tend to emphasise the caution which must be exercised in practice to secure a reasonable degree of equilibration as between the various parties concerned, a process more often than not of considerable difficulty. From a social standpoint the carrying to a successful conclusion of projects of this kind represents some of the most important work which falls to the lot of lawyers in both branches of the profession, and in human interest is not transcended in any other sphere of practice on the Chancery side. While Family Arrangements are of frequent occurrence, it is doubtful whether they are entered into as often as might well be the case. In a great number of instances resort to the Court to sanction a scheme is not called for, and many a will of doubtful construction if disposed of by Family Arrangement after due professional advice for those concerned would not find its way to add to the mounting list of reported cases, which frequently enough are discounted on citation as involving no principle of general application and being purely referable to the particular wording or circumstances attending the testamentary instrument in question. Where resort to the Court is necessary or deemed advisable, a reluctance on the part of some of the parties is often met with, regardless of the fact that the probable alternative will be resort to the Courts by way of contested litigation. A well-planned scheme of Family Arrangement should in most cases make the confirmatory proceedings a process of the kind which should by its very nature dispel such reluctance as might otherwise be not altogether inexplicable, and *ex hypothesi* if the arrangement is not reasonably equilibrated it is hardly entitled to the designation it bears. A very broad application of the maxim "He who seeks equity must do equity" will often illumine such an arrangement, lighting up both its strong and weak points, and this is perhaps best illustrated by examining the transaction in relation to third parties. Where a Family Arrangement is *bona fide* and fair as between all the parties thereto it will not be necessarily void as against creditors although its effect may delay some of them, but if it is substantially a device to deprive them of their rights then it will be set aside at their instance. (See hereon 13 Eliz. c. 5, the Bankruptcy Acts generally, *Penhall* v. *Elwin*, 1 Sm. & G. 258, and *Re Maddever*, 27 Ch. D. 523.) As to costs in respect of actions to cancel or vary such Arrangements see *Stapilton* v. *Stapilton* (*supra*), and *Talbot* v. *Stainforth*, 1 John. & H. 484.

Charles Butler's æsthetic appreciation of conveyancing craftsmanship will be readily recalled by readers of his numerous writings, and that great conveyancer's eminent pupil, Lewis Duval, it will be remembered, when asked whether perusing abstracts was not dull work, admitted that it often was, but that sometimes his labours were rewarded by a "brilliant deed" (see hereon Lord Campbell's *Lives of the Chancellors*). Lord Justice Fry, in his *Studies by the Way*, in the chapter on "Conveyancing", observed that "not only is conveyancing an art—it is a fine art . . . which admits in its best estate of a high degree of perfection". A deed of Family Arrangement is not the least difficult instrument which the conveyancer is instructed to draw, and it may be said that the best drafted precedents exhibit a symmetrical artistry appropriately designed to effect the human harmony which it is the purpose of such documents to secure.

TENANTS' COVENANTS—I.

(Outgoings, Fair Wear and Tear and Waste.)

By E. O. Walford, LL.D., Solicitor.

It is, of course, generally appreciated that leases and tenancy agreements are drawn on behalf of the landlord and not on behalf of the tenant. It does not, however, appear to be the practice of solicitors acting on behalf of tenants to challenge substantially the wording of "common form" covenants, or to take a determined stand against certain covenants which, though "common form", impose upon the tenant who accepts them liabilities far beyond those which he intends to undertake.

(1) Covenants to Pay Rates, Taxes and Outgoings.

Thus, it appears to be a common practice for solicitors and estate agents who prepare tenancy agreements for short terms to insert a covenant by the tenant to pay "all rates taxes assessments [duties impositions] and outgoings payable in respect of the premises" comprised in the tenancy agreement. Though the Law Reports abound with decisions which show that no short-term tenant should undertake to pay outgoings, duties, impositions or assessments, one or more of those words will be found in practically every draft lease which is prepared on behalf of a landlord where the rent is not inclusive of rates. The word "outgoings" is probably the widest of the general words above mentioned, though there is normally no justification for using any of those words except the word "rates" or possibly "rates and water charges".

If the tenant covenants to pay all outgoings payable in respect of the premises he will not be liable merely for outgoings of a regularly recurring nature, but will be liable for many works of permanent improvement, *e.g.*, road-making charges, or the expenses of relaying of drains. It is useless for the tenant to urge that his tenancy is only

for a short period. At one time it appeared that the Courts would respond favourably to the argument that it could not have been the intention that a short-term tenant should discharge the expenses of works of permanent improvement: see *Harris* v. *Hickman*, [1904] 1 K. B. 13. However, that decision was disapproved by the Court of Appeal in the case of *Lowther* v. *Clifford*, [1927] 1 K. B. 130. There it was held that even where a person is merely holding over as a yearly tenant (after the expiry of his lease) he was liable for road charges under a covenant to pay outgoings, impositions and assessments.

In spite of the innumerable decisions which have been given by the Courts during the past and present century, short-term tenants are still to be found who will agree to pay outgoings. Perhaps the best known of the older decisions are *Aldridge* v. *Ferne* (1886), 17 Q. B. D. 212; *Foulger* v. *Arding*, [1902] 1 K. B. 700; and *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447. In proof of the view that such covenants still cause trouble I may mention two recent decisions. In the first of these cases the tenant had agreed to pay all rates, taxes and outgoings in respect of the premises except tithe rentcharge and landlord's property tax. The tenant paid the owner's drainage rate under a statute which gave to tenants the right to recover such rate in the absence of any stipulation to the contrary. The tenancy agreement was entered into in 1924, and the rate was levied under the Land Drainage Act, 1930. It was argued that the "outgoings" referred to in the covenant could not include a burden imposed by a subsequent statute (*i.e.*, a new kind of outgoing); but this argument was rejected by the Court. Accordingly the tenant was held to be liable to bear the whole of the drainage rate, and not merely the separate portion known as the tenant's drainage rate: *Smith* v. *Smith* (*No.* 2), [1939] 4 A. E. R. 312.

In the second case, *Francis* v. *Squire*, [1940] 1 A. E. R. 45, the tenant had agreed to pay "all existing and future rates, taxes, assessments, duties and outgoings whatsoever *imposed or charged* on the premises". Pausing here, it may be useful to point out that a covenant to pay outgoings *imposed upon* the premises may enable a tenant to escape liability for outgoings, such as water rates or water charges, which though payable in respect of the premises are not "imposed" on them: see *Bourne & Tant* v. *Salmon & Gluckstein*, [1907] 1 Ch. 616, following *Badcock* v. *Hunt* (1888), 22 Q. B. D. 145. But in the case of *Francis* v. *Squire*, *supra*, which we are now considering, the sum in question was an amount payable in respect of works executed under the Private Street Works Act, 1892, and which constituted a charge on the freehold. The landlord having paid the expenses in question, it was held that he was entitled to be reimbursed by the tenant under the covenant above mentioned.

Unless the landlord is prepared to agree that the tenant's covenant shall be limited to the payment of general rates and water rates or water charges, which is not usually the case, some other formula has to be found.

It is generally found that the landlord's solicitor is willing to accept a provision that the tenant shall pay outgoings "of an annual or other regularly recurring nature". That will, no doubt, leave the tenant liable to pay such items as land tax, and the *whole* of the

drainage rate (including the owner's rate) under the Land Drainage Act, 1930 (see *Smith* v. *Smith, supra*), and any other periodical outgoings which would normally be payable by the tenant *or by the landlord.*

The point under discussion is not new, and it has for many years past been pointed out in the *Encyclopedia of Forms and Precedents* (Vol. 8) that the appropriate covenant in such cases is one which excludes outgoings which in the absence of stipulation would be payable by the landlord. Whether the position is that practitioners do not care to attempt to ascertain what outgoings are payable by a landlord in the absence of express stipulation, or whether it is feared that some new kind of rate might be thrown upon the landlord, or whatever other reason there may be for the refusal of landlords' solicitors to accept such a formula, it is the fact that it is normally impossible to persuade solicitors acting for landlords to do so. It is, therefore, found in practice that the limitation of the covenant to outgoings "of an annual or other regularly recurring nature" is the best compromise which can be obtained, the express exclusion of land tax and tithe redemption annuity being also conceded in many cases, particularly where the tenancy is short. I am stating here what happens in practice, and not necessarily what is equitable, or even what is intended by the landlord. From personal experience, I think it is clear that in many cases the landlord is just as surprised to find that he is exempt from liability to pay certain "outgoings" as the tenant is to find that his covenant extends to such matters. This is particularly the case in relation to such works of improvement as road works or the relaying of drains. Thus, A takes a tenancy of a house for a period of three years and agrees to pay all "rates, taxes and outgoings" payable in connection with the premises in question. When the tenancy has one month to run, the road having been made up meanwhile by the local authority, the expenses become a charge on the premises comprised in the tenancy. How can it be supposed that the tenant had expected to be placed under liability to pay for *the upkeep in perpetuity* of the adjoining road in exchange for a three years' tenancy with the use of the made-up road only for a few weeks? Before concluding this section, it is necessary to draw particular attention to the position in connection with tithe redemption annuities.

Prior to the Tithe Act, 1936, it was unnecessary to insert in an occupation lease or tenancy agreement any reference to tithe rentcharge, as by virtue of the Tithe Act, 1891, it was impossible to throw upon the occupying tenant any liability to pay tithe rentcharge. It will be noted that I have referred to occupying tenants. The earlier Act threw upon certain long-term tenants, not being occupiers, a portion of the tithe rentcharge payable in respect of the demised premises.

The position was substantially changed by the Tithe Act, 1936, under which instalments of "tithe redemption annuity" are payable by the "owner" of the land: section 16 (1). Who is the "owner" for this purpose? The answer is to be found in section 17 of the Act. Shortly the position is as follows:—

(1) Unless the freehold is subject to a long lease at less than a rack rent (*i.e.*, a lease for more than fourteen years at a rent

which is less than two-thirds of the net annual value) the freeholder is the "owner".

(2) If the land is subject to such a long lease (and at such a rent) as last mentioned then the lessee under that lease is the "owner".

(3) No rack rent tenant will be under any liability to pay any part of the annuities *in the absence of any stipulation to the contrary.*

By section 17 (7) of the Tithe Act, 1936, persons entitled under any tenancy agreement or lease entered into before that Act was passed retain the benefit of any indemnity to which they were previously entitled (in relation to the new redemption annuity). But there would appear to be nothing to prevent parties to a lease or tenancy agreement entered into after the passing of the Tithe Act, 1936, from making their own bargain. Hence:—

(1) If the lease is for a term exceeding fourteen years at less than a rack rent, and is granted on or after October 2, 1936, the lessee will be liable to pay the whole of the annuity payments during the term of the lease. There would appear to be nothing to prevent the parties from contracting that the landlord should pay all or any part of the annuity payments.

If the bargain is that the landlord shall pay the annuity it would not be sufficient to except from the covenant to pay rates, taxes and outgoings, "tithe redemption annuity". The lessee's liability arises under the Act, and it will be necessary to insert an express covenant by the lessor to pay the annuity.

(2) If the lease is for a term exceeding fourteen years at a rack rent, or for a term not exceeding fourteen years, whatever the rent, an awkward trap arises. The Tithe Act, 1936, does not render the lessee liable; but if the lessee agrees to pay all rates, taxes and *outgoings*, he will probably be liable to pay the tithe redemption annuity. In *Parish* v. *Sleeman* (1860), 1 De G. F. & J. 326, it was held that tithe commutation rentcharge was an "outgoing" within the meaning of an agreement for lease at a rent "free of all outgoings". On the other hand, it has been held that in the case of a covenant to pay taxes, rates and assessments, the word "assessments" is to be construed in accordance with the *ejusdem generis* rule and will not extend to an exceptional burden imposed upon the land (*Tidswell* v. *Whitworth*, 36 L. J. C. P. 103; L. R. 2 C. P. 326), and that tithe rentcharge is not an "assesment" of such a kind: *Jeffrey* v. *Neale*, 40 L. J. C. P. 191; L. R. 6 C. P. 240.

However, I do not think that too much reliance should be placed on the two last-mentioned cases where there is any context which could affect the matter, *e.g.*, where the covenant is to pay all rates, taxes and assessments payable in respect of the premises, whether imposed on or payable by the landlord or occupier thereof.

In order to exclude liability for tithe redemption annuity it would not appear to be sufficient to limit the tenant's liability to "regularly recurring outgoings". As these annuity payments have to be paid

for a total period of thirty years they are, no doubt, regularly recurring. They should therefore be expressly excepted.

(2) Covenant to Repair.

It is not proposed to consider here the general effect of covenants to keep the demised premises in repair, but rather to make some practical observations and suggestions as to the modification of repairing to meet particular circumstances.

(a) *Fair wear and tear exception.*

A covenant to keep premises in repair, "fair wear and tear excepted", is a very usual covenant in the case of tenancies from year to year or for a short term of years. It is, in fact, the form of covenant which is inserted when the tenant is not expected to effect any repairs or decorations to the premises. So far as the writer's personal experience goes, that is, for the past thirty years, and no doubt for a very much longer period, non-repairing tenancy agreements have contained this rather peculiar covenant. I say "peculiar" because it is expressed in the form of an express covenant to repair with a specified exception; but in practice the tenant who enters into such a covenant supposes that if he does not cause any damage to the property beyond fair wear and tear he will be under no liability for repairs or decorations to the property. That supposition, as we shall see, is ill-founded. At one time it was considered that although the tenant was entitled to submit the property to fair wear and tear, yet if in the course of the occupation of the property and of such fair wear and tear the premises got into such a condition that it was, for example, no longer wind and water tight, the tenant must then do what was necessary to prevent the elements from causing further damage to the property. According to the decision in *Haskell* v. *Marlow*, [1928] 2 K. B. 45, the tenant was liable to effect such repairs as were necessary to prevent the consequences flowing from fair wear and tear from producing other consequences which wear and tear would not produce directly. That was a very complicated proposition for a simple man to understand. It was, therefore, comforting to learn, when the question came before the Court of Appeal some nine years later, that the fair wear and tear exception had no such effect: see *Taylor* v. *Webb*, [1937] 2 K. B. 283. It is now settled by the last-mentioned case that so long as the tenant is not submitting the premises to any user or other treatment beyond fair wear and tear he is not under liability to effect repairs to the property, however dilapidated, leaky or draughty it may become, *so long as nothing unusual happens.* I am well aware that it is necessary not only to justify but also to explain the words which I have italicised in the last sentence. The explanation and justification are as follows. The main covenant is "to keep [the premises] in repair". That is an absolute covenant which would, if it stood alone, render the covenantor liable to make good damage of all kinds, even though caused by act of God (such as violent storm or unprecedented flood), act of a third party or even by acts of the King's enemies (subject to legislative exemption) or inevitable accident. As is said in the much-quoted case of *Paradine* v. *Jane* (1647), Aleyn 26, the tenant "might have provided against it

by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt down by lightning or thrown down by enemies, yet he ought to repair it". The extent to which the tenant is immune from absolute liability must therefore depend upon the exact effect of the exception in respect of fair wear and tear.

Wear and tear may, of course, be produced by the act of the tenant or those whom he has permitted to occupy, use or visit the property, or by the elements or by third parties. As to user by the tenant or other persons occupying or using the property there is, in principle, no difficulty in determining the limits of fair wear and tear. It is, however, difficult to apply the term "fair" to the action of the elements. One may, of course, speak of "fair weather"; but it would be incongruous to speak of "fair rain" or "fair exposure" or "fair storm"; and the term "fair wind" is only intelligible in connection with navigation of the sea and, perhaps, of the air. In this connection the words "fair wear and tear" must presumably mean wear and tear produced by the normal or ordinary action of the elements as distinct from violent and unusual manifestations of nature. In *Manchester Bonded Warehouse Co.* v. *Carr*, 49 L. J. C. P. 809; 5 C. P. D. 507, Lindley, J. (as he then was), observed that the words "reasonable wear and tear" no doubt include destruction to some extent—destruction of surfaces by ordinary friction—but not total destruction by a catastrophe never contemplated by either party.

Taylor v. *Webb*, *supra*, therefore appears to produce the following rather illogical result. A tenant who covenants to keep the demised premises in repair, "fair wear and tear excepted" will be responsible for all repairs which may be necessary, if the property is damaged by third parties or by hurricane, lightning, flood, tempest, fire (whether caused by act of God or human agency), earthquake, or by other extraordinary occurrences, the King's enemies, riot or civil commotion, or by any accident (whether within his control or not), but will not be responsible for any damage arising from the ordinary and normal operation of the elements or other natural causes of damage to or deterioration to property.

Having spoken of extraordinary manifestations of nature, it would be satisfactory if one could say what is an extraordinary or abnormal operation of nature. It is possible to argue that in some cases gales, or violent storms, are not necessarily abnormal, but rather seasonal, and the question whether, for example, a gale or a particular degree of frost at a particular time in a particular place is abnormal may one day require to be decided by the Courts, or by a jury. No doubt the question must be one of fact in every case. It is thought that the test cannot be whether or not such a gale or flood or frost or other occurrence has ever been known in such a place at such a time. It is probably impossible to formulate a reliable test; but an approximation may perhaps be arrived at by putting the question, "Was this the sort of occurrence [or weather] which one would consider abnormal at such a time in such a place". It can hardly be said that every kind of storm or flood in every kind of place is abnormal. Thus, it is well known that some low-lying houses in the neighbourhood of a river are apt to be flooded, either every year or most years, or in some cases more than once each year. Again, low temperatures which would be quite unusual

in places on the south coast are often experienced in the northern, even the midland portions of England. If, in either of the two cases last mentioned, there is a flood or severe frost the question, it is submitted, is not simply one of average for the time (*e.g.*, in the case of frost the average temperature for that particular month), but how often there had been as severe a flood or frost within the knowledge of an old inhabitant, though not necessarily of our very old friend, the most ancient inhabitant.

I hope that enough has been said to show that where a person is taking a non-repairing lease the usual fair wear and tear exception is not sufficient. It is, I think, generally recognised that there should also be an exception in respect of fire, and no doubt in districts where flooding is not unusual an exception in respect of flood will be allowed. Probably the following formula would best express the liability which the tenant expects to accept :—

> "*To make good all damage beyond fair wear and tear and damage by fire caused by the Tenant his sub-tenants servants agents or licensees to the demised premises.*"

"Damage by fire" is mentioned because it is assumed that the tenant will not be responsible for the insurance against damage by fire of the demised premises. Alternatively, the following clause might be employed where the landlord wishes to adhere to the fair wear and tear formula :—

> "*To keep the demised premises in their present condition and state of repair, fair wear and tear, damage by fire or by any competent authority* (*a*), *war damage, act of God and inevitable accident excepted.*"

The phrase "other inevitable accident" should be avoided owing to the *ejusdem generis* rule : see *Saner* v. *Bilton* (1878), 7 Ch. D. 815.

The exceptions embodied in the last-mentioned covenant would, it is thought, exempt the tenant from liability in respect of all damage which he would be unable to prevent by taking all precautions which could be reasonably expected of a prudent and careful tenant : see *Nugent* v. *Smith* (1876), 1 C. P. D. 423, a leading case on the meaning of "act of God" (*b*).

It is not unusual for solicitors acting for landlords to use the term "accidental fire" instead of "fire" in the exception clause. But an absolute exception in respect of fire is necessary. Even if the term "inevitable accident" is introduced as above suggested, I do not think that that term would exempt the tenant from liability where the fire is occasioned (as it generally is) by the negligence of the tenant or a member of his household or staff (*c*). The case of *Harris* v. *Poland* [1941] 1 A. E. R. 204, is of interest in this connection, although the insurance was of personalty. That was a case in which a lady who had insured her jewellery against various risks including damage by

(*a*) It is proposed to explain in a subsequent issue the reason for this particular exception: see Walford's Draft Leases (3rd ed.), p. 134.

(*b*) See also the observations of Sir F. Pollock in his work Principles of Contract (10th ed.), at pp. 288, 289, where it is contended that the term "act of God" does not include all inevitable accidents.

(*c*) In order that a tenant may be quite safe on this point it is really desirable that the exception should be in respect of "damage by fire whether occasioned by negligence or not, provided that the negligence is not such as to render the fire insurance moneys irrecoverable".

fire, hid her jewellery under coal and wood in a grate. Being somewhat absent-minded, one fine (or not so fine) day she lit the fire without removing the jewellery, and duly recovered from the insurance company appropriate compensation for the damage done by the conflagration, notwithstanding the contention of the insurance company that the policy was not intended to cover cases where the insured put the insured articles in fire grates or other places where fires were normally lit. In relation to insurance of buildings insurance companies do not normally set up the negligence of the insured in answer to claims under fire policies.

Another reason for omitting the word " accidental " in relation to the exception of damage by fire is that a tenant who is not responsible for insuring against fire should not be responsible for the making good of damage caused by a third party who deliberately sets fire to the demised premises, or for damage caused by riot or civil commotion, which is certainly not " fair wear and tear or accidental damage by fire ", though it might well be " inevitable accident ".

Under the form of qualified covenant above suggested, the tenant must, of course, take such care of the property as would be taken by a careful tenant, short of the expenditure of moneys upon the repair or decoration of the premises. Thus, if the tenant leaves a casement open and unfixed, so that it swings with the wind, breaks its hinges, falls to the ground and is broken, the tenant must replace or repair the casement, even if the wind causing the damage is of gale force. He can successfully plead " act of God " or " inevitable accident " only if he has exercised all reasonable care.

(b) *Repairing Liability apart from covenant.*

The title of this section might well be " Waste ", for if a tenant is to be held liable at the suit of his landlord to keep property in repair, apart from statutory and contractual obligations, that liability will generally be found to arise out of the doctrine of waste. I refer to the liability of the tenant " at the suit of his landlord ", because the position of a tenant *vis-à-vis* third parties may be quite different, particularly if neither the landlord nor the tenant has undertaken repairing obligations. It is abundantly clear, in such circumstances, that if when the tenant enters into possession the property is in such a condition that it is causing, or likely to cause, damage to adjoining premises or to third parties, then the tenant will be liable to the owner of those adjoining premises, or to third parties who are injured, if he does not remedy the condition of the property: *Broder* v. *Saillard*, 2 Ch. D. 692; *Wringe* v. *Cohen*, [1940] 1 K. B. 229. I mention this point in order to draw attention to the liability of the tenant under the normal short-term tenancy agreement which contains no covenant by the landlord to keep the premises in repair or to remedy any nuisance from the condition of the premises at the commencement of the tenancy.

As already noted, the Court of Appeal decided in *Taylor* v. *Webb*, *supra*, that a covenant to keep premises in repair, " fair wear and tear excepted ", does not render the covenantor liable to carry out any works which are necessary to prevent further damage flowing from fair wear and tear. What greater or less liability is imposed upon a

tenant who enters into no repairing covenant whatever? In such cases the doctrine of waste may render the tenant liable to effect certain repairs. Waste may be either voluntary, permissive or ameliorative. Voluntary or "commissive" waste consists of actual damage in the everyday sense of that term, or of some reconstruction or alteration or other work which changes the existing condition of the property or the nature of the cultivation of the land. Where the alteration or work is such as to increase the value of the reversion it is referred to as ameliorative waste. A more correct, though inelegant, term for this class of waste would be "beneficial voluntary waste".

The third class of waste is known as permissive waste, and consists of decay or damage caused by (a) the action (whether normal or abnormal) of the elements or (b) fair and proper user of the premises for the purposes of the tenancy. I need hardly say that it is assumed, however short the tenancy may be, that the tenant will exercise all reasonable care in the use of the property and that if he negligently leaves the property open and unsecured and windows swinging loose in the wind, or skylights open to admit rain, he is guilty of voluntary and not merely of permissive waste, though he is not bound to expend money upon improvements to premises which have been let to him in a ruinous condition, or which fall into a ruinous condition owing to want of repair.

Works which are "improvements" in law may constitute voluntary waste. The technical meaning of the term "improvement" is well illustrated by the provisions of section 19 (2) of the Landlord and Tenant Act, 1927. It is enacted by that sub-section that the landlord's consent is not to be unreasonably withheld to the making of "improvements" in certain cases, but there is an express reservation of the right of the landlord to require the payment of a reasonable sum "in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord". Those words are a sufficient reminder that works which constitute, technically, an improvement may nevertheless amount in law to voluntary waste if they depreciate the value of the reversion. Such works are not "ameliorative waste", for that term is reserved for works which increase the value of the reversion. It is well settled that in the case of unauthorised alterations no damages can be awarded if they cause no damage to the reversion: *Meux* v. *Cobley*, [1892] 2 Ch. 253. Moreover, an injunction will not be granted to restrain ameliorative waste in the absence of an express provision in the lease prohibiting alterations: *Doherty* v. *Allman* (1878), 3 App. Cas. 709.

All tenants, whether at will, on sufferance or for any other term, are liable for voluntary waste. Tenants for less than a year do not appear to be liable for permissive waste, and therefore have no repairing liability in the absence of express stipulation.

The liability of a tenant from year to year in respect of permissive waste appears to be limited to keeping the premises wind and water tight: *Wedd* v. *Porter*, [1916] 2 K. B. 91; *Marsden* v. *Edward Heyes, Ltd.*, [1927] 2 K. B. 1. The headnote to the last-mentioned case states that a tenant from year to year is under an implied obligation to use the property in a tenant-like manner and to yield it up so used at the end of the tenancy. It is quite true that an

observation to this effect was made in the course of the judgment; but the actual decision was merely that a tenant who wrongfully alters the character of the building is liable in damages, which is, no doubt, sound law. The *Marsden Case* is therefore no authority for the proposition that a tenant from year to year is liable to keep the property in good and tenantable repair generally, or to do more than keep it wind and water tight and refrain from harmful alterations or works.

Tenants for terms of years appear to be responsible for both permissive and voluntary waste. The case of *Yellowly* v. *Gower* (1855), 11 Exch. 274, is an authority to that effect, and although the question has since that date been regarded in certain quarters as open to argument, it would seem to be unlikely that the Courts would question that decision and the numerous *obiter dicta* to the same effect.

It will be seen that a rather interesting result flows from the decision of the Court of Appeal in *Taylor* v. *Webb*, *supra*. It is clear from that decision that if a lessee covenants to keep the demised premises in repair, fair wear and tear excepted, he is under no obligation *by virtue of such a covenant* to carry out works necessary for arresting decay of the interior or the action of the elements (*e.g.*, by preventing from entering and doing further damage). In some respects, therefore, the obligations of such a tenant are less than those of a tenant for a term of years who enters into no repairing covenant, unless the doctrine of waste renders the tenant liable to do more than is required by the covenant itself. That point could not arise in *Taylor* v. *Webb*, *supra*, because in that case the lessor had entered into the covenant with the fair wear and tear exception—a "topsy turvy" covenant, as Scott, L.J., termed it.

It has been said on the authority of *Kinlyside* v. *Thornton* (1776), 2 Wm. Bl. 1111, and *Marker* v. *Kenrick* (1853), 13 C. B. 188, that the landlord's remedies under the repairing covenants and under the doctrine of waste are cumulative, and that even if the matter complained of as waste is also a breach of an express covenant the action for waste lies. But there must be actual voluntary waste and not mere breach of covenant: *Jones* v. *Hill* (1817), 7 Taunt. 392. In other words, if it is alleged that the tenant, having covenanted to keep the property in repair, failed to do so, there would be no action in waste; but if there were a similar covenant and the tenant took down one of the walls or did other actual damage then an action in waste would lie. Where on the true construction of the covenant the tenant is not liable for failure to effect repairs of a given description, there is little doubt that the maxim *expressio unius est exclusio alterius* would apply, as in the case of an express but limited covenant for quiet enjoyment: *Monypenny* v. *Monypenny*, 9 H. L. Cas., at p. 139. And it has been held that where a lease contains an express covenant to repair, there can be no implied contract to repair implied by the relationship of lessor and lessee: *Standen* v. *Chrismas*, 10 Q. B., at p. 141; and see *Gott* v. *Gandy*, 2 E. & B. 845 (position of landlord), and *Doe* d. *Dalton* v. *Jones* (1832), 4 B. & Ad. 126.

Lastly, in the absence of an express covenant, not only to repair and uphold but to rebuild, a tenant will not be liable to rebuild premises which fall down owing to their structural condition, provided that the tenant has merely used them in a proper manner conformably

with the terms of the lease: *Lister* v. *Lane*, [1893] 2 Q. B. 212. *A fortiori* there is no such liability under the doctrine of waste.

But if a wall falls down a tenant who is under full repairing liability must re-erect it: *Lister* v. *Lane*, *supra*.

AGRICULTURE AND EMERGENCY LEGISLATION.

By J. B. Richardson, Barrister-at-Law.

An article on the above subject appeared in *The Conveyancer* for September, 1940 (Vol. 5 (N.S.) p. 23) by Mr. P. H. Thorold Rogers. Since that date many alterations have been made in the provisions affecting agriculture and I have been asked by the Editor to write an article bringing the position up to date. I do so with considerable trepidation, as it is well-nigh impossible to keep pace with the floods of Statutory Orders issued relating directly or indirectly to the matter; and I can only apologise in advance if there are any unintentional omissions caused by inadvertently omitting to notice such Orders. Further, the subject embraces many matters not exclusively dealing with agriculture, and is therefore one that cannot be adequately dealt with in a single article. I have therefore confined myself chiefly to the control over agriculture exercised by the Minister of Agriculture and Fisheries and the War Agriculture Executive Committees set up under the Defence Regulations and to the position of landlords and tenants. Following the example of my predecessor, I have used the word "farmer" as including every kind of agriculturist.

War Damage.

This is most conveniently considered under the heads of insurance, landlord and tenant, and compensation.

Insurance.

The difficulties with regard to insurance of buildings and goods against war damage have now been surmounted by the various War Damage Acts, now consolidated by the War Damage Act, 1943. By this Act insurance of hereditaments is made compulsory and under it contributions are made payable by the owners of proprietary interests in the land. It is unnecessary to consider the general provisions of the Act; the chief points relating to agricultural land are as follows: (1) The rate of contribution is sixpence in the pound for each instalment instead of the normal two shillings (section 43). (2) It is contemplated that value payments will normally be made in the case of war damage to agricultural land and buildings and not a payment of cost of works. By section 5 (2) hereditaments are divided into two classes: (a) buildings (other than buildings the use of which is accessory to the use of other land and which would not be readily marketable apart from that other land), and (b) land other than as aforesaid. Agricultural buildings would seem to come within the exception to class (a). By section 7 (1) in the case of class (b) the

payment is to be a value payment, unless a cost of works payment (determined by reference to proper cost ascertained as at March 31, 1939) is likely to be less than such value payment. "Agricultural land" and "agricultural buildings" are defined in the Act as having in England the same meanings as in the Rating and Valuation (Apportionment) Act, 1928, except that "agricultural buildings" include a farm-house occupied in connection with any agricultural land and any agricultural cottage so occupied which is on or contiguous to the land. "Agricultural cottage" means in relation to any land a house used as a dwelling-house of any person employed in agricultural operations on that land in the service of the occupier and entitled, whether as tenant or otherwise, so to use the house only while so employed. The definition of agricultural land in the Rating and Valuation (Apportionment) Act, 1928, is :—

> "Any land used as arable, meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds, orchards or allotments, including allotments within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens (other than as aforesaid), pleasure grounds or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse; and for the purposes of this definition the expression 'cottage garden' means a garden attached to a house occupied as a dwelling by a person of the labouring classes."

The definition of "agricultural building" is :—

> "Buildings (other than dwelling houses) occupied together with agricultural land or being or forming part of a market garden and in either case used solely in connection with agricultural operations thereon."

It may be noted that in the case of land held on a tenancy from year to year, or for any term not exceeding seven years without a right of renewal, or for any term which may be determined by the landlord at or before the expiration of seven years, the tenancy is called "a short tenancy" and does not constitute a proprietary interest in the land for the purposes of the Act (s. 123). Consequently such a tenant is not liable for any part of the contributions or entitled to any part of the value payment; and any attempt to throw any liability for contributions on him is void (section 114).

As regards insurance of chattels, under the Act the Board of Trade operates two schemes, the business scheme and the private chattels scheme. By section 86 (2) in the case of a farming business insurance under the business scheme to a minimum amount equal to the multiple of £10 which is nearest to twice the net assessment of the farm for the purposes of Schedule A is compulsory. Where twice such assessment is a multiple of £5 but not a multiple of £10, the minimum is to be reduced by £5. In the case of a farmer occupying the farm as a tenant the annual rent of the farm is substituted for the net assessment under Schedule A for this purpose. The Board of Trade may by Order exempt any classes of persons from the operation of this

provision, and may also prescribe a figure for the net assessment under Schedule A exempting all persons occupying a farm under such figure from compulsory insurance. The Board of Trade by S. R. & O., 1941, No. 450, prescribed the figure of £50 as the amount of the net assessment under Schedule A, exempting the farmer from compulsory insurance under the business scheme so long as that figure is not exceeded. In that case the chattels may be insured under the private chattels scheme, provided that the value does not exceed £100.

Apart from the War Damage Act, 1943, the landlord and tenant of agricultural land are respectively entitled to compensation under section 3 of the Compensation (Defence) Act, 1939, in the case of non-requisitioned land for any acts done on behalf of His Majesty which reduce the annual value of the land; but adjustments are made under section 109 of the War Damage Act, 1943, to prevent payments being made under the Act of 1943 in such cases, and also to provide that in certain cases which would have formerly come under the Act of 1939 claims must now be made under the Act of 1943.

Landlord and Tenant.

The position as regards the termination or modification of the terms of a tenancy of agricultural land appears to be the same as at the date of the former article. The provisions of the Landlord and Tenant (War Damage) Acts, 1939 and 1941, relating to notices of retention (conditional or not) and of disclaimer do not apply to agricultural tenancies; but by section 19 of the Act of 1939 :—

> "Where any buildings or works comprised in an agricultural lease . . . (whether made before or after the commencement of this Act) are unfit by reason of war damage the court may on the application of the tenant either determine the lease or modify the terms thereof whether by reducing the rent payable thereunder or otherwise according as appears just having regard to all the circumstances."

"Agricultural land" has the same meaning as in the Rating and Valuation (Apportionment) Act, 1928 (see above). "Unfit" means "unfit for any purpose for which the tenant can be reasonably expected to use the land, having regard to the terms of the lease under which it is held".

War damage to land or crops is not a ground for application under this section. Jurisdiction is exercised by the county court but subject to the provisions of section 111 of the County Courts Act, 1934, which provides for the removal of proceedings commenced in a county court to the High Court. By section 11 of the Act of 1941 any obligation to insure land against war damage is void.

Encouragement of Food Production.

As mentioned in the previous article the marketing schemes of peace-time have been largely shelved with a view to removing restrictions.

By the Agriculture (Miscellaneous Provisions) Act, 1940, the subsidy provisions under the Agriculture Act, 1937, have been largely extended, increasing the quota payments for wheat, amending the oats

subsidy and extending it to rye, and amending the barley subsidy. The same Act extended the right to the ploughing-up grant of £2 an acre. By the Agriculture (Miscellaneous Provisions) Acts, 1941 and 1943, the Exchequer contributions towards purchases of lime and basic slag have been extended and increased. The same Acts also contain provisions as to the drainage of agricultural land.

Control of Cultivation.

The powers of the Minister of Agriculture and Fisheries over the cultivation of land are chiefly given to him by the Defence Regulations 61—65. By Regulation 66 the Minister is empowered to delegate his powers under 61, 62, 62A, 62BA, 64 and 65; and by S. R. & O., 1939, No. 1078, he delegated his powers under Regulations 62 and 63 and also (in exercise of other powers of delegation) his powers under Regulations 51 and 85, and, in relation to chattels required in connection with the use of land, his powers under Regulation 53, to the War Executive Agricultural Committees set up for each county; but the previous consent in writing of the Minister is required for the taking possession of any land or the termination of any tenancy or the taking of any chattel found on or removed from land of which the Committee take possession. Under a subsequent Order this consent does not appear to be requisite where possession of land is taken in the case of non-compliance with Orders.

Regulation 61 enables the Minister to prohibit the use of any land which is agricultural land at the time of the Order except for agriculture. Such Order may be either general or confined to a particular area. Also if any person without reasonable excuse trespasses (a) on any land used for the purpose of allotments, or (b) on any other land on which a crop is growing and thereby damages the crop, he will be guilty of an offence against the Regulation. There is now no requirement as to any notice being exhibited on the land.

Regulation 62 empowers the Minister to "give such directions with respect to the cultivation, management, or use of land for agricultural purposes as he thinks necessary or expedient for the purpose of promoting, increasing, or maintaining the production in the United Kingdom of articles necessary for the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community". If any directions so given are disregarded by a tenant of any agricultural land the Minister may by notice served on the tenant and on the landlord terminate the tenancy on the date specified in the notice and require the tenant to give up possession of the land. If the Minister is satisfied that the tenant of an agricultural holding is not cultivating it according to the rules of good husbandry, the Minister may similarly terminate the tenancy. Any constable may take such steps and use such force as may be reasonably necessary for securing compliance with any Order to give up possession. This provision removes any difficulty as to the duty of the landlord, or the power of any other person, to take legal proceedings to remove the tenant. Such termination is to be treated as the termination of the tenancy for the purposes of the Agricultural Holdings Act, 1923 (without any implication that the tenancy is terminated by notice to

quit from the landlord) and accordingly the provisions of the Act (other than sections 12 to 14) apply as to the respective rights of both parties on such termination. Nothing is said about rights depending on contract or custom, and therefore it would appear that they still hold good. Where the Minister or any person acting under his authority is in possession of any land the Minister or such person (as the case may be) may make contracts for the occupation of the land, and such contracts may incorporate with or without modifications any of the provisions of the Agricultural Holdings Act, and the occupier is to be deemed to be the tenant of the other party to the contract. Where any person has taken possession of any agricultural land under the Regulations, sections 1 to 8 of the Agricultural Holdings Act are to apply as if that person were a tenant under a contract of tenancy beginning on the date when possession is taken and ending on the date when possession is given up. Where an agricultural holding or any part thereof is subject to a contract of sale made since September 3, 1939, or has been sold pursuant to such a contract, any notice to quit is void, unless consent in writing is obtained from the Minister. Where the tenant of an agricultural holding gives or receives a notice to terminate the tenancy of the whole or any part of his holding, the landlord must within one month of the giving or receiving of such notice inform the War Agricultural Executive Committee. This last provision does not give any power to the Committee to nullify the notice. "Agricultural holding" and "rules of good husbandry" have the same meaning as in the Agricultural Holdings Act, 1923. Power is given to plough up any right of way, public, private or customary, which is not a carriage or cart way, subject to such conditions as may be necessary for restoring it when this provision ceases to be in force and in the meanwhile affording necessary facilities for the public or persons entitled to use the way.

The powers of the Minister have been increased by the Agriculture (Miscellaneous Provisions) Act, 1940. By section 23, where possession has been taken of agricultural land by the Minister or the Committee under Defence Regulations *and* the Minister on the advice of the Committee certifies that at that time the land was not being cultivated in accordance with the rules of good husbandry, the Minister or the Committee may remain in possession for any period not exceeding three years from the expiration of the emergency period. Compensation is payable during such period in the same manner as during the emergency period. The Minister or the Committee may make a contract for the occupation of the land for any period expiring or terminable by the Minister or the Committee before the end of the three years; and such contract may incorporate with or without modifications any provisions of the Agricultural Holdings Act. When possession of the land is given up, the owner is to pay within one month after demand in writing a sum equal to the increase in value of the land due to any work done by the Minister, the Committee, or the occupier; but he may elect to pay the sum with interest by annual instalments not exceeding five. The amount is, in default of agreement, to be settled by an arbitrator appointed in default of agreement by the President of the Chartered Surveyors' Institution.

As the powers under Regulation 62 are expressed to be given in

respect of " the cultivation, management, or use of land for agricultural purposes ", it is conceived that " management " must be construed *ejusdem generis* with " cultivation " and " use ". It therefore follows that the Minister or Committee have no right to select tenants for the landlord; and the better opinion is that they cannot require the owner to incur capital expenditure such as installing a new water supply or erecting new agricultural buildings. Drainage schemes come under different powers.

Liability on Compliance with Orders.

So far as compliance with ploughing-up Orders is concerned the matter is now settled by section 15 of the Agriculture (Miscellaneous Provisions) Act, 1943. By sub-section (1) a tenant who has ploughed up permanent pasture under directions from the Minister or a War Agricultural Executive Committee is relieved from all liability under the contract of tenancy or otherwise for so doing. Such land is to be deemed to be and to have been at all material times arable land for the purposes of the contract and the custom of the country and the Agricultural Holdings Act, except that the tenant is not to be entitled to claim an away-going crop or compensation therefor for a larger acreage than he could have claimed if the sub-section had not been passed. By sub-section (2) the tenant is to be entitled to all claims for growing crops, sown tillages, or manuring carried out in compliance with directions given under Defence Regulations for the cultivation or management of the land, as if they were carried out in accordance with the contract of tenancy, though they may contravene that contract or exceed the amount allowed. By sub-section (3) where in pursuance of such directions the tenant has made any improvements consisting of the removal of bracken, gorse, tree roots, boulders or other like obstructions to cultivation, the tenant is to be entitled to compensation as if the improvement were one specified in the First Schedule to the Act of 1923 and the consent of the landlord had not been required; but any grant made out of public moneys for carrying out such directions is to be taken into account. Sub-sections (1) and (3) are not to apply to tenancies to which sub-section (1) of section 26 of the Agriculture (Miscellaneous Provisions) Act, 1940, applies, or to which sub-section (2) of that section applies, except in the latter case so far as directed by the arbitrator. (As to these tenancies, see below, " Tenancies exempted from the Act of 1923 ".)

The landlord therefore has no remedy against the tenant for deterioration caused by ploughing up permanent pasture. It appears that he has no claim for compensation under section 3 of the Cultivation (Defence) Act, 1939, and this is understood to be the view taken by the Ministry of Agriculture and Fisheries. Under W.A.C. 1510 a pledge has been given that the landlord shall receive compensation for diminution of " annual value " sustained through " ploughing up ", but this does not appear to amount to more than " a gentleman's agreement ".

The section only deals with ploughing-up Orders so far as relief from liability to the tenant is concerned; and the position where compliance with other Orders leads to deterioration of the holding is still an open question. Neither landlord or tenant appears to have

any claim under the Compensation (Defence) Act, and, whichever party is to bear the loss, the result is extremely unfair, save so far as in the case of the tenant he has benefited (as he usually will) by being allowed to use his holding in ways forbidden by his contract of tenancy without additional payment in the shape of rent. The position under the present law contrasts very unfavourably with that under the Corn Production Act, 1917, by which the rights of both parties were defined and their interests safeguarded.

TENANCIES EXEMPTED FROM THE ACT OF 1923.

Under section 26 of the Agriculture (Miscellaneous Provisions) Act, 1940, nothing in the Agricultural Holdings Act, 1923, is to apply to a contract of tenancy of land for a term not exceeding four years beginning after the commencement of the Act (March 31, 1940) and before the end of the war period, if (a) the contract provides for the cultivation of land as arable, and, where the land consisted of permanent pasture immediately before the beginning of the term, provides for the sowing by the tenant of permanent grass seeds along with the last or away-going crop, *and* (b) immediately before March 31, 1940, and thereafter to the beginning of the term either (i) the land was not being used for agricultural purposes, or (ii) the land was so used in pursuance of a letting not being a contract of tenancy within the meaning of the Act of 1923, or (iii) the land consisted of permanent pasture and was occupied by the landlord.

Under section 26 (2), in the case of any contract made after September 2, 1939, and before March 31, 1940, if the landlord satisfies an arbitrator appointed under the Act of 1923 that by virtue of the foregoing provisions that Act would not apply if in such provisions references to September 2, 1939, were substituted for references to March 31, 1940, and also that the parties intended that the Act of 1923 or any provision thereof should not apply to the contract, then that Act or that provision is not to apply to the contract. How he is to satisfy the arbitrator as to the intention of the parties is not suggested.

"War period" is defined as the period for which the Emergency Powers (Defence) Act, 1939, is in force.

By section 14 of the Agriculture (Miscellaneous Provisions) Act, 1943, these provisions are extended to contracts of tenancy where the term has been extended so as to exceed a period of four years but not a period of eight years, and to new contracts made to take effect immediately after the expiration of contracts coming within section 26 of the Act of 1940, provided that such contracts are for periods not exceeding four years.

REQUISITIONING OF LAND AND DISCLAIMER OF LEASES.

Agricultural land is, like all other land, liable to be requisitioned under Regulation 51 by any competent authority and persons to whom the power has been delegated. As in the case of a tenancy terminated by Order, any constable may take such steps and use such force as appears to him reasonably necessary for securing compliance with any Order requiring any person to give up possession. Any land so

requisitioned may be put to any use the competent authority deems expedient for (shortly) the prosecution of the war. When the Minister of Agriculture and Fisheries or a War Agricultural Executive Committee take possession of land and use it for agricultural purposes he or they have the powers of letting, etc., mentioned above.

In the case of requisitioned land the owner and occupier are entitled to compensation under the Compensation (Defence) Act, 1939, and in this case will be entitled to compensation for deterioration of the holding due to agricultural operations impoverishing the soil. In the case of holdings where the rent is wholly suspended or reduced under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, provision is made for the payment of the annual compensation in lieu of rent wholly or partly to the landlord by Regulation 79CA. By that Regulation, on the application of the landlord, if the authority or person in possession is satisfied that the tenant is wholly exempt under the above Acts from payment of the rent, or if the authority or person in possession does not know the address of the tenant and is satisfied that no payment of rent due during the preceding six months has been paid by him to the landlord, such authority or person in possession may pay such annual compensation to the landlord. The landlord must take all reasonable steps to notify the tenant of such decision. Whether the annual compensation is paid in the first place to the landlord or to the tenant, it or so much of it as is necessary must be first appropriated to payment in full of the rent which the landlord is, or but for suspension or reduction under the above Acts would be, entitled to receive from the tenant, and the balance (if any) paid to or retained by the tenant.

Under the Landlord and Tenant (Requisitioned Land) Act, 1942, provision is made for the disclaimer of certain leases comprising land requisitioned under emergency powers. The leases to which the Act applies are leases which provide that the term thereby created shall expire or may be determined not later than five years after "the material date"—defined as the date of taking possession or the passing of the Act (March 26, 1942) whichever is the later—or that such term will expire or may be determined at the end or not later than twelve months after the end of any war in which His Majesty may be engaged. "Lease" includes any tenancy or agreement for a tenancy. The Act will therefore apply to nearly all agricultural tenancies. In the case of any such leases, where possession of all the land comprised in the lease has been taken by the Crown in the exercise of emergency powers, and the land or the main part of it was immediately before such taking used by the tenant or a member of his family as his residence or for the purposes of his business or as both, the tenant may within three months of the material date serve a notice on the landlord that he disclaims the lease, provided that the Crown still retains possession at the date of the notice. The landlord may within one month after service of such notice apply to the Court to determine whether the notice is invalid on the ground that the foregoing conditions have not been fulfilled. Where part only of the land is requisitioned, or possession of part is subsequently given up, the tenant may within three months of the material date apply to the Court, and the Court may direct that the foregoing provisions shall apply as if

possession of all the land had been taken and retained and may extend the time within which the notice of disclaimer may be served. If the Court does not decide that a notice of disclaimer is of no effect, the notice becomes effective at the expiration of one month from its service or such further period as the Court may in certain circumstances allow, and the lease disclaimed is deemed to be surrendered on that date and all derivative interests extinguished. For the purposes of sections 9 and 10 and 16 (2) of the Agricultural Holdings Act, 1923, any agricultural tenancy disclaimed shall be deemed to be terminated at that date. On an application to the Court made before, but not after, the date when the notice of disclaimer becomes effective, the Court may (a) vest the lease in any mortgagee or chargee of the term on such terms as the Court may think just, and (b) make modifications as between landlord and tenant of any obligations as to repairs. The tenant must within seven days of service of the notice of disclaimer serve on any mortgagee or chargee of the term a copy of such notice and of the name and address of the landlord. Provision is made for the case of multiple leases, but such leases are not likely to occur in the case of agricultural land. Where possession of part only of a disclaimable tenement is taken and retained by the Crown and the lease is not disclaimed, and possession of the remainder or part thereof is subsequently taken and retained, and the tenant cannot serve notice of disclaimer on the subsequent occasion because possession of part had already been taken and retained, the tenant may within three months from the material date on the second occasion make an application to the Court to which the landlord is to be made a party, and the Court may give leave to serve a notice of disclaimer. Where the tenant is abroad for three months from the material date or the greater part thereof and the Court is satisfied that he has not had a reasonable opportunity of exercising his rights under the Act, it may extend the time and may also authorise any other applicant, being a proper person to exercise those rights on behalf of the tenant, to exercise such rights on his behalf. Provision is made for the apportionment of rent (including rent payable in advance) in respect of time, and for payment after disclaimer of the annual compensation in lieu of rent to the landlord. Provision is also made for the removal of fixtures. In the case of agricultural tenancies the fixtures which the tenant may remove under section 22 of the Agricultural Holdings Act, 1923, may be removed within a reasonable time after possession has been taken.

The powers of the Court under the Act are to be exercised by the county court, subject to the power of removal to the High Court of proceedings commenced in the county court.

Drainage.

There are numerous provisions under the Regulations and various Acts for the drainage of agricultural land, but they are too complicated to be dealt with in detail.

Miscellaneous.

Under Regulation 62AA it is now an offence to permit dogs to stray on allotments unless the owner or person in charge of the dog

has taken all reasonable steps to prevent such straying. This Regulation applies to allotments on which notices are posted warning the owners and persons in charge of dogs of the Regulation. By Regulation 62B all restrictions imposed by tenancy agreements, contracts or covenants against the keeping of pigs, hens and rabbits or erecting buildings or structures for that purpose are removed, but this is not to authorise any nuisance or anything prejudicial to health.

By Regulation 62BA where any Order is made for the removal of livestock from any land for the purpose of preserving it or improving its condition, the Minister may direct that it be delivered and accepted for agistment by the occupier of other land.

By Regulation 62D it is an offence to permit any crop harvested from agricultural land to be damaged by failure to take reasonable steps to keep the crop in good condition. By Regulation 63 power is given to authorise the destruction of game, pests and deer. Under this Regulation, Orders have been made dealing with the destruction of rabbits, rooks, deer, wood pigeons, and peregrine falcons.

The Order now restricting the acreage and amount of certain luxury and semi-luxury products is the Horticultural (Cropping) Order, 1943, S. R. & O., 1943, No. 1068, which forbids the growing of such specified products beyond the amount specified, without the written consent of the War Agricultural Executive Committee. The Order also requires glasshouses not already wholly or partially planted with permanent crops (as explained in the Order) to be used, except to the extent specified, wholly for the production of tomatoes and other specified crops and forbids the planting of permanent crops in glasshouses, unless in either case the Committee agree in writing to the contrary. Details will be found in the Order.

The position as regards agricultural contractors is virtually the same as at the date of the former article; and so is the position with regard to the power of local authorities to requisition land for allotments, so it is not proposed to deal with them.

The farmer has, of course, the same protection under the Courts (Emergency Powers) Acts and kindred provisions as anyone else; but these matters are outside the scope of this article.

LIABILITY FOR DRY ROT.

By Archilex.

It appears that in consequence of the closing and boarding up of premises following bomb damage dry rot has occurred in many cases. This has happened, I am told, where temporary repairs have been effected to the roofs, the window spaces also being boarded up, and the property left to look after itself. Now it is well known that dry rot is caused by fungi which eat into and feed upon wood. It is also known that dry rot does not attack wood which is perfectly dry. It may seem peculiar that the term dry rot should be applied to a complaint which only attacks damp wood; but the explanation is that

the words " dry rot " do not imply that the wood has rotted because the atmosphere was too dry. What happens is as follows. Wood which has become damp is liable to be attacked by fungi which appear not only to eat, but to drink with equal voracity. The result is that these fungi do not merely make the damp wood dry, but go further and reduce it to a friable, brittle, powdery condition. These fungi have also other habits which, though interesting, are very objectionable from the viewpoint of property owners. For example, they form strands or strings whereby they pass across bricks or metal and attack more distant wood. Their spores are also blown about by currents of air, and thus the disease is spread to other portions of the same building. It is, however, to the strands or strings to which I wish to draw particular attention. These strings " are capable of penetrating mortar and may sometimes be found in the middle of soft bricks. Thus, they can readily pass through partition walls, and in one case are known to have penetrated a stone wall two feet thick " (*a*).

It will therefore be seen that there are two aspects of the matter which may concern a solicitor in whose care a bombed building has been left or for which he is responsible in the capacity of a trustee.

First, he should consider what steps are necessary to prevent the occurrence or arrest the progress of dry rot within that building. That question should be referred to a surveyor or architect.

Secondly, if it is found that dry rot has occurred, he should consider whether it is *possible* that it has spread or might spread to adjoining premises. If so, the surveyor or architect should be instructed to take particular care to insure that measures shall be taken to prevent the extension of the damage to adjoining property (*b*).

The Legal Aspect.

As with all legal problems, complications can arise where the facts are special and a number of persons enjoy various interests in the premises where the dry rot has occurred or in the premises to which it has spread. I propose, therefore, to state only the legal position which arises out of the occurrence of this troublesome pest in relation to its effect upon adjoining premises.

Occupiers.

From very early times, occupiers of buildings (irrespective of ownership) have been held liable to keep them in such a condition that they shall cause no harm to adjoining property. I have stated this duty at its highest in order to emphasise the fact that liability in nuisance does not depend upon proof of negligence. It is not sufficient for the defendant to say: " I was careful, and took all reasonable safeguards ", unless he also adds: " and the danger was latent or was caused by the act of a third party ". The answer is: " Liability in nuisance is not entirely dependent upon want of care. It

(*a*) See " Dry Rot in Wood " (3rd ed.), p. 4, issued by the Department of Scientific and Industrial Research.

(*b*) It will no doubt be a nice question, in cases where it is suspected that dry rot has already spread to adjoining premises, whether it is better to " leave well alone " or to inspect the adjoining premises. The relevance of this observation will appear from the later observations in the text of the article.

is enough that you have caused the nuisance, and even if you did not cause it or could not reasonably have foreseen that it would occur, you must abate it now that its existence has become apparent" : *Broder* v. *Saillard*, 2 Ch. D. 692; *Sedleigh-Denfield* v. *St. Joseph's Society*, [1940] A. C. 880. The last-mentioned case overruled a decision of the Court of Appeal that a person who had not himself caused a nuisance was not liable to a third party if he permitted it to continue.

Landlords and Third Parties.

I must make it clear that I am not attempting here to deal with the position as between landlord and tenant where dry rot is caused by the damp condition of property which is left unheated after war damage has occurred. I am dealing solely with cases where the property of a third party suffers damage owing to the intrusion of dry rot. Thus, No. 10 Smith Street suffers substantial war damage and is left derelict. No. 12 Smith Street suffers only slight war damage and remains in the occupation of its owner. If dry rot occurs in No. 10 and spreads to No. 12 will the occupier or (if it is let) the landlord be responsible for the damage caused by dry rot to No. 12? We have seen that the occupier may be responsible. It has, however, been laid down by the Court of Appeal that if the landlord has undertaken (*vis-à-vis* the tenant) the liability of keeping the tenanted property in repair he, *and not the occupier* of that property, is liable for injury to an adjoining owner's property, owing to any nuisance arising on the tenanted property : *Wringe* v. *Cohen*, [1939] 4 A. E. R. 241. It may be that the landlord does not in fact know that the nuisance has arisen; but if it has in fact arisen *owing to want of attention* he will nevertheless be liable : *ibid.*

I have said above that if the landlord is liable for the repair of the property it is he, and not the occupier, who is liable to a third party in respect of nuisance arising on the tenanted property, and have cited *Wringe* v. *Cohen*, *supra*, as authority for that proposition. The *dictum* in that case is definite enough; but its accuracy has been doubted because it conflicts with principles which have been clearly established by earlier cases. I have, however, expressed my views on this point at length elsewhere (Law Journal, March 23, 1940, at p. 142, written before the *Sedleigh-Denfield Case* (*supra*) had reached the House of Lords), and readers of *The Conveyancer* can refer to the later article of Mr. L. A. Blundell to the same effect in *The Conveyancer* for December, 1940 (at pp. 104—110). Accordingly, I need say no more on this point, except that although a landlord has been held responsible to third parties where he had undertaken repairing liability, and has been held free from liability where he had not undertaken such liability, there would appear to be no case in which either a repairing or a *non*-repairing tenant has been held free from liability to a third party for a nuisance occurring on the demised premises. The answer is, no doubt, that the occupier cannot escape liability in nuisance to a third party (*c*), but that the landlord cannot be liable in nuisance unless he has undertaken liability for works which, if effected, would prevent such nuisance from arising or continuing.

(*c*) Except in the case of act of third party, latent defect or act of God, as explained later.

Third Parties and Hidden Defects.

For the sake of accuracy, it is necessary to mention that neither an owner nor a tenant or a mere occupier of property is liable in respect of damage *immediately* resulting from a nuisance which arises owing to the act of a third party or of a latent defect (*d*). The reason is, of course, that if a man could not by any means prevent or foresee the occurrence of the nuisance it would be inequitable to hold him liable for the occurrence. This exemption from liability does not, however, extend to anything beyond the original occurrence of the nuisance and its direct and *immediate* consequences. The tenant or occupier cannot fold his arms and say: "I have not entered into any covenant to repair the property which I occupy or to do any works which may be necessary to put matters right." An occupier who does not abate a nuisance within a reasonable time after it has occurred and has come to his knowledge is said to "continue" it, and is liable for such continuance: *Sedleigh-Denfield* v. *St. Joseph's Society, supra* (*e*).

It is quite clear from the cases that an occupier must abate a nuisance which has occurred without his fault; but the nuisance must be a continuing one in order that the occupier should be liable in such circumstances. I do not mean that there must be an actively continuing series of occurrences. A third party may have thrown refuse upon the land of the occupier and thus created a nuisance. The occupier is then liable for harm ensuing during his occupation so long as the condition of nuisance continues. He must put an end to the nuisance, and cannot successfully contend that the nuisance is not continuing because it happened only once, and is not one of a series of recurring acts.

Limit of Liability.

There must, however, be a limit to this doctrine. Otherwise an occupier might be liable not only for nuisances which arise during his occupation, and those which exist when he begins to occupy the premises (*f*), but also for all the consequences of all nuisances which ever occurred at any time upon the premises. I do not think that I can do better than repeat the words of Sir John Salmond in his work on *Torts* (6th ed., p. 289, footnote (*f*)): "This principle" (*i.e.*, of liability for nuisances existing when occupation begins) "is not applicable so as to make the occupier of land liable for subsidence which happens during the period of his occupancy by reason of an excavation or other withdrawal of support in the time of his predecessor in title. There is here, it seems, no continuing nuisance for which the occupier for the time being can be held responsible; there is merely a completed act done by his predecessor in title, which becomes

(*d*) In *Wringe* v. *Cohen*, [1939] 4 A. E. R. 241, this principle was accepted without question; and it is well settled by numerous earlier authorities.

(*e*) As indicated above an occupier who, through absence or want of attention to the premises, fails to learn of the nuisance is in no better position than an occupier who remains upon the premises. He will be deemed to know what would have come to his knowledge if he had so remained: cf. the *dicta* in the *Sedleigh-Denfield Case*, cited in the text, *supra*.

(*f*) There is no doubt that an occupier is required to abate a nuisance which existed on his land when he entered upon the occupation of the property, *Broder* v. *Saillard*, 2 Ch. D. 692; *Coupland* v. *Hardingham* (1813), 3 Camp. 398. But I do not know of any case which decides that he must make good any damage to adjoining property caused by the nuisance before his occupation commenced. He must, however, "put his own house in order".

actionable as against that predecessor so soon as damage ensues: *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493; *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165." I must, however, express the personal view that it seems difficult to extract a clear principle from those observations if, as Sir John Salmond observes at p. 288 of the same work, an occupier is liable "for a continuing nuisance which already existed on the premises when he first entered into possession of them" [and no doubt he is so liable] "it being his duty either to refrain from taking possession of such premises or else to abate the nuisance so soon as he becomes the occupier". Apart from the case of *Broder* v. *Saillard*, *supra*, where an artificial mound, existing when the tenant took possession, caused a nuisance to the adjoining premises and the tenant was held to be liable for continuing the nuisance, there are also such cases as *Brent* v. *Haddon*, Cro. Jac. 55, where a tenant was held liable for "continuing" a weir wrongfully erected before the tenancy began, and the very recent *Sedleigh-Denfield Case* (*supra*) where an artificial but static object caused a nuisance for which a subsequent occupier was held liable. I venture to submit that the *Hall* and *Greenwell* decisions to which Sir John Salmond refers in the above-mentioned footnote should be taken as sound authority only for the proposition that an owner or tenant of underground strata is not liable in damages to the owner of buildings on the surface for injury resulting from an excavation by a former owner or occupier (*g*).

Infraction of Rights.

It must not be forgotten that in most cases of nuisance the party damnified has suffered an interference with his legal *proprietary* rights, and if anyone, however innocent, is permitted to allow the nuisance to continue the result may be to deprive the damnified party *pro tanto* of his property or proprietary rights.

Apart from special well-known exceptions, the law recognises that no one can give what he has not himself (or may not lawfully take). An incoming occupier must therefore respect all rights of adjoining owners or occupiers or of other third parties who have legal proprietary rights which were enforceable when occupation was taken. But an incoming occupier is not liable in damages for a positive wrongful act done, once and for all, by a previous owner or occupier even if the effects of that wrongful act only appear after the incoming occupier has begun to occupy the property (*h*). He must not, however, continue a nuisance.

Returning now to the question of dry rot and damage done by it prior to occupation by a new tenant or owner, we observe that the damage has not been done by a positive act of the former owner or occupier. It has arisen from an omission. Sir John Salmond appears to have considered that except in cases of positive misfeasance "liability dependent on occupation lasts only so long as the occupation

(*g*) See Seton's Judgments and Orders (7th ed.), Vol. I, p. 568, where the text is similarly limited, and the point is dealt with under the heading of support.

(*h*) See Salmond on Torts (6th ed.), (which I believe was the last edition prepared by Sir John Salmond), p. 289, footnote (*s*). As, however, the occupier is liable for continuing a pre-existing nuisance I am doubtful whether this principle is sufficiently restricted by Salmond in the last paragraph of § 6 (p. 290), where he says that liability for positive misfeasance "is based, not on occupancy but on the doing of the act".

on which it is based" (*op. cit.*, p. 290). If those words mean that an occupier who has failed by acts of omission so to use his property as to refrain from causing a nuisance to an adjoining property can throw off the liability by going out of occupation I do not know of any authority for that view. So far as the authorities go, the inference is that whilst an occupier is in occupation he is liable for nuisances arising during his occupation. It can hardly be thought that his neighbour who has commenced or is entitled to commence proceedings against him for causing or continuing a nuisance is to be deprived of any remedy which he may have in damages against the occupier if the occupier sees fit to give up possession. I feel therefore that the passage in question must only be taken as meaning that an occupier cannot be held liable for *continuing* a nuisance except in respect of the period during which he has in fact occupied the property. Thus stated, the proposition is not only undeniable, but is so obvious that one is disposed to think that Sir John Salmond must have meant something less apparent. But it seems difficult to go further without denying the validity of well-established principles. The examples which Salmond gives, namely, that the owner of a ruinous house ceases to be liable for it as soon as he has sold it, and that the owner of a dangerous animal transfers his liability to the purchaser of it, tend to confirm the view above expressed. If I choose to keep a leopard in my house and allow it to bite a neighbour with whom it is more anxious to make contact than I am, I can hardly expect that I shall escape liability by selling the leopard. If such a defence were available we may be sure that leopards or other dangerous animals would be more widely kept than they are at present.

With regard to dry rot it would therefore seem that if the occupier allows dry rot to commence during his occupation he is liable for the damage which ensues to his neighbour's property, and that if dry rot has commenced before his occupation began he will be responsible for all results which ensue during his occupation if, after the nuisance ceases to be latent, he fails to abate it within a reasonable time. It is possible that where the dry rot existed when the occupier took possession he will not be liable to make good any damage caused before the date when the injured party requests him to abate (*i*) (*i.e.*, to put an end to) the nuisance; but I do not think that it would be safe at the present day to rely on the old authority to that effect, particularly if the nuisance was not latent, or had ceased to be so.

Is Dry Rot Latent?

I do not think that dry rot which has reached an advanced stage would normally be latent in a legal sense; but it is a matter for architects rather than lawyers to say whether (in special circumstances) it could be regarded as latent in its earliest stages. However, I think it is clear that dry rot is generally caused by want of proper care of the building in which it begins. Therefore, where an occupier brings about dry rot or allows it to continue owing to such want of care it seems reasonably clear from *Wringe* v. *Cohen*, *supra*, that unless the occupier can show that he is a tenant whose landlord has

(*i*) See *Penruddock's Case*, 5 Co. Rep. 100b.

undertaken the obligation to do what was requisite to prevent the occurrence of dry rot (*e.g.*, by heating the premises), he will be liable for any damage which results *during his occupation* from the dry rot so caused. The decision in *Wringe* v. *Cohen* seems to proceed on the footing that the normal action of nature upon buildings is not to be equated with act of God, or of third parties, or with latent defects. Those three excusing factors have no connection with a case in which the defendant brings about the trouble by his own failure to observe the maxim "*Sic utere tuo ut alienum non laedas*".

Is Dry Rot a Nuisance?

I have assumed rather than proved that an occupier who allows dry rot to spread to adjoining premises is guilty of the tort of nuisance. However, I do not think that there is any real doubt about that point. It has been held, where tree roots spread underground and cause damage to the property of an adjoining owner, that the owner of the tree is liable in nuisance : *Butler* v. *Standard Telephones, etc., Ltd.*, [1940] 1 K. B. 399. I see no reason for distinguishing between the spreading of dry rot fungi and the spreading of tree roots. The question whether the liability to third parties for the damage which ensues will rest upon the occupier or upon his landlord (if any) is to be determined by reference to the remarks made in the earlier part of this article.

The moral for owners and trustees of premises which have had to be left untenanted is obvious. Prevention is better than cure, and is generally more economical in the long run. In the case of war-damaged premises it will, no doubt, be recalled that if the owner or mortgagee of war-damaged property or of a proprietary interest therein fails to take steps which he might reasonably have been expected to take in order to preserve the property from further deterioration a deduction may be made (at his expense) from the war damage compensation : War Damage Act, 1943, Sched. III, para. 2 (*k*).

(*k*) No attempt has been made in this article to deal with the position as between landlord and tenant in relation to failure to comply with covenants to repair, or in relation to liability under the doctrine of waste where the tenant is liable for permissive waste. In cases where dry rot follows upon the neglect of premises following war damage it must not be supposed that the position is fully covered, or that the tenant is fully protected, by s. 1 of the Landlord and Tenant (War Damage) Act, 1939.

THE LIBRARY.

Rent Restrictions Guide. By Lionel A. Blundell, LL.M., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd.; Estates Gazette, Ltd. 1943. xviii and 140 pp. (10s. 6d.)

The fact that the Lord Chancellor has been appointed to preside over a Committee to enquire into rent restriction is some evidence both of its importance and of its intricacy. A peculiar fate seems to have dogged legislation introduced as a temporary measure owing to the last war but gradually extended. It is due in part, of course, to the inevitable inequalities arising from restriction between owners of property. Nevertheless, the system of repeated legislation by reference complicated by rules made under the Acts have made this subject a wilderness that seems to be quite barren of instruction or interest. The subject is a purely practical one and this guide sets out to provide the maximum of assistance in the minimum of space. The method is an ordered exposition citing the numerous relevant authorities with a print in an Appendix of the various Acts as they have been amended. Repealed sections are indicated or printed as practical needs dictate.

In our opinion this is the correct procedure. The annotated Act, sometimes necessary or convenient for temporary purposes, is not a sound method of exposition and certainly inadequate for those not reasonably familiar with the principles of the subject. It is very difficult to ensure that all relevant sections have been consulted, but even if they are it is not improbable that their relevant relationship has escaped attention. Mr. Blundell has done these things for us and seems to have done them very well. The text of the commentary is clear and concise and the arrangement seems to be as logical as the nature of the subject dictates. We wish this book well, though to wish for a long life would be to wish for the continuance for a very unhappy state of the law.

Compensation (Defence). By Eric Strathon, F.S.I., Chartered Surveyor. With a Foreword by C. Gerald Eve, P.P.S.I. London: Sweet & Maxwell, Ltd. 1943. viii and 147 pp. (10s. 6d.)

As indicated by the authorship this is a work primarily for surveyors rather than for the legal profession. It contains a commentary followed by an Appendix containing a print of the Compensation (Defence) Act and some other statutory provisions together with the rules. The commentary has two valuable features. One is the details given of a number of decisions by the General Claims Tribunals. These decisions are not in front of the ordinary practitioner and it may be very convenient to him to have notice of them when advising his client. The other is the number of purely practical hints based on the knowledge of how compensation will be made and what should be watched or avoided. So, for example (on p. 8), a lessee is warned concerning a proper schedule of condition where property is delivered up on requisition and his position *vis-à-vis* his landlord explained; on p. 56 the owner of chattels is guided in the sort of provision which should be made in a hiring agreement.

Since the problems with which this book is concerned are mainly problems of value it is naturally of greater consequence to the profession of surveyors. Nevertheless it should prove of great assistance to all conveyancers who have occasion to act frequently for property owners whose property has been subjected to claims under the respective Acts and Rules.

Burke's War Damage and Compensation. Supplemental Part No. 10—War Damage Act, 1943. Edited by Robert Schless, Barrister-at-Law. Hamish Hamilton (Law Books), Ltd.

The appearance of the Consolidating War Damage Act, 1943, has led to a new

issue, replacing the earlier Acts, in the now familiar form. There is a preliminary note followed by a reprint of the Act together with commentary on the individual sections.

Burke's Courts Emergency Powers Practice, High Court and County Court. Second edition. By JOHN BURKE, Barrister-at-Law. Sweet & Maxwell, Ltd. (10s. 6d.)

The first edition of this useful manual was noticed in our June number. The second one was made necessary by the issue of new Rules replacing the Rules of 1940; these are helpfully annotated by Mr. Burke.

War Damage Guide. By JOHN BURKE, Barrister-at-Law. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. 1943. x and 148 pp. (10s. 6d.)

This is a guide to the War Damage Act, 1943, in the form of a summary of the Act including summaries of the cases decided on the former Act and the Landlord and Tenant (War Damage) Acts, 1939–41. The summary contains some useful examples of the incidence of contribution.

Besides these matters there is an Appendix representing about a third of the book which contains miscellaneous matters such as the Practice Notes of the War Damage Commission (annotated with reference to the new Act) and Code of Professional Fees. One of the most valuable assets of the book is a comparative table, operating both ways, showing the relation between the provisions of the former Acts and those of the 1943 Act. By the tests we have given it the Index (which refers the reader to the sections of the Act as well as to the pages of the book) is a good one.

Altogether a most useful guide which practitioners would do well to consult before contending with the actual text of the new Act.

County of London Plan. By J. H. FORSHAW, M.C., M.A., F.R.I.B.A., M.T.P.I., and PATRICK ABERCROMBIE, M.A., F.R.I.B.A., P.P.T.P.I. London: Macmillan & Co., Ltd., St. Martin's Street. 1943. (12s. 6d.)

We have received a copy of this very handsome book illustrated by voluminous maps, plans and illustrations of what has been, is and is proposed to be. To anyone interested in planning the book is of obvious value for the analysis of the problems and for the proposals for meeting them. The book is in no sense about the law, but it is probably safe to prophesy that all conveyancers will be faced with the problems set them by Town Planners—and Country Planners for the matter of that. Looked at from the conveyancing lawyer's point of view, some of the solutions suggested smack of a degree of co-ordination with which we have not yet become familiar. To take a random illustration we find that in certain East End areas it is proposed to build rows of terrace houses and also large blocks of flats. These are to be occupied as to the terrace houses by large families and as to the flats by small families and single persons. To carry out such a scheme effectively we arrive at the following results. The landlords must be prepared to refuse to let the houses to any but large families and the flats to large families. Secondly, the normal processes of time will reduce the family and the parents will then have to leave the old house in which they have lived for many years and which they regard as "home" and, perhaps, if they want to keep their friends and neighbours move into a flat which will not fit their furniture or their notion of "home". Similarly, the small family may become larger and willy-nilly their tenancy may be determined. The last proposition is obviously the least objectionable of this regulation of the way of life of the ordinary man, and no doubt can be readily justified. The other points can, of course, be justified scientifically on population density, but we shall find that England, English law, and indeed Englishmen will be changing. It may be for the better, but they will be changing. By some study of the proposals, lawyers might be able to assist in trying to change the law without too much diversion of the traditional relation between the law, the administration and the common man, though there is undoubtedly a possible other viewpoint that the traditional relation is wrong. If so, let us see clearly what is right.

Modern Equity. By Harold Greville Hanbury, D.C.L., M.A., Barrister-at-Law, Fellow of Lincoln College, Oxford, Assistant Reader in Equity to the Council of Legal Education. Third edition. London: Stevens & Sons, Ltd., 119 Chancery Lane. 1943. xxiv and 620 pp. (37s. 6d.)

This is primarily a student's book on Equity and is not, therefore, so directly the concern of this Journal, and a third edition within ten years is ample indication that it is a good book. It is, indeed, rather more than a good student's book on Equity. It is a readable book in which the relevant cases are clearly set out, analysed and applied. As such it is a book of real value to the practitioner and the writer can speak from personal experience in consulting the previous edition of assistance in matters of practice. Obviously such a work is not intended to be exhaustive, but at least the relevant line of authority is brought to the notice of the reader and the arrangement and cross-headings are very helpful in finding the required point at issue.

The learned author is to be congratulated in keeping down the length of the new edition and upon the incorporation of emergency legislation in an appendix. There is also a good index. We can recommend this book with every confidence.

The Solicitor's Handbook of War Legislation (Krusin & Rogers). Vol. 4. Published by Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. (35s.)

This work includes the emergency statutes published up to the end of the year 1942. It also incorporates the relevant case law up to mid-April, 1943. Though bound works of this kind must necessarily lag a little behind the times, subscribers can "check up" on subsequent Statutes and Orders (if any) through the special service of the publishers from whom lists of subsequent Acts and Orders can be obtained.

The present reviewer has had the pleasure of testifying to the merits of the previous volumes, and need only say that he is glad to have this volume to add to the earlier ones on his shelf. No doubt this volume will, like the others, be referred to constantly; but it will very shortly need to be followed by a further volume containing the consolidated War Damage Act, 1943, and Courts (Emergency Powers) Act, 1943.

E. O. Walford.

Books Received.

A Guide to Land Registry Practice. By John J. Wontner. Fifth edition. The Solicitors' Law Stationery Society, Ltd. 17s. 6d. net.

Burke's Loose Leaf War Legislation. Edited by Harold Parish. 1943. Nos. 3 to 11. Hamish Hamilton (Law Books), Ltd. 6s. each.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Charities—gift for the benefit of a staff training college.—The question of what will constitute an educational charity is not very simple. As long ago as *Clark* v. *Drew* (1853), 1 Drew. 642, a gift to the Female Orphan School in Greenwich patronised by Mrs. Enderby was held not to be a charity. In *Re Hummeltenberg,* [1927] 1 Ch. 237, a gift to found a college for the training of spiritualistic mediums was also held to fail, though this decision was due in part at least to uncertainty of the training to be given.

In *Re Leverhulme,* [1943] 2 A. E. R. 144, a gift to the staff training college of Lever Bros., Port Sunlight, was also held to fail. This training college was essentially for members of the staff and the training formed part of their working hours and, in the finding of the learned Judge, was at least partly designed to enable that staff to be better fitted to discharge their duties. On the other hand, the training was not wholly technical. Morton, J., referred to the words of Chitty, J., in *Hoare* v. *Hoare* (1886), 56 L. T. 147, where he said that there there was " no general intention of a public character ".

In this particular case there were certain other features, among them, the fact that the college was organised so that it could place employees in positions suitable to their abilities and was conducted as a department of the company. It was in all the circumstances of the case that the learned Judge held that the gift was not charitable.

In view of the extension of work that would ordinarily be described as educational by private firms it may be important to consider exactly what is implied in an " educational " charity. " Education " has not been narrowly confined and has been held to include a school treat: *Re Mellody,* [1918] 1 Ch. 228; the development of the drama: *Re Shakespeare Memorial,* [1923] 2 Ch. 398; the provision of a fives court at a public school: *Re Marietti,* [1915] 2 Ch. 284; and technical education: *Re Vagliano,* [1905] W. N. 179. The additional requirement upon which Morton, J., laid stress, namely, " a general intention of a public character ", appears to be the real key to the problem as it affects what may be described, perhaps, as " private institutions ". Any charity must have a public character except, perhaps, the relief of poverty, which in itself seems to have a public aim; because here funds for maintaining the retired staff of a firm (*Re Gosling,* 48 W. R. 300); or the poor kinsmen of the donor (*Att.-Gen.* v. *Price,* 17 Ves. 422) have been upheld. This is true also of a gift to educate the donor's kinsmen and descendants at a school or college: *Att.-Gen.* v. *Sidney Sussex College,* L. R. 4 Ch. 722. Nevertheless, it would seem that to constitute an educational charity, an institution, besides providing education, must also have some public character, and in cases of doubt it should be seen that gifts are made absolute and not limited to income and that they are given to the correct body. The gift in the instant case failed partly because it was to be applied for the benefit of the staff college and was not given to the company to be applied for that purpose.

Another example of the problem is to be found, with the decision going the other way, in the *Royal Choral Society* v. *Inland Revenue Commissioners,* [1943] 2 A. E. R. 101. The Court of Appeal held that though members of the society joined for their own pleasure and performances were given to the public nevertheless the society was a charity and only a charity, and its income was employed only for a charitable purpose. The Master of the Rolls laid great stress upon *Re Shakespeare Memorial Trust* (*supra*); the reasoning of P. O. Lawrence, J., in that case he approved. On the other hand (at p. 106) he described as misleading a passage in *Tudor on Charities* (5th ed.) p. 39, that " the fine arts, however, are probably not regarded as objects of charity; and a gift to encourage artistic pursuits was held not to be charitable ". But it is otherwise if the element of instruction is introduced: a gift for an art school is good ". In Lord Greene's view, an artistic education did not merely include teaching executants, whether it were actors to act, or painters to paint, or musicians to perform. The essential feature of the *ratio decidendi* appears to be in the following words (at p. 106): " It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it, looks to be the real purpose, is found not to be the real purpose. A body of persons may purport to set themselves up for educational

purposes; but, on a full examination of the facts, it may turn out that their purpose is nothing of the kind and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may be merely a by-product."

(2 K. & E., p. 299.)

Variation of settlements—scheme to avoid income tax—sanction of the Court—Trustee Act, s. 57.—Re Basden's Settlement Trusts, [1943] 2 A. E. R. 11, can be noted shortly. It was an application under the Trustee Act, 1925, s. 57, to vary the trusts of a settlement in favour of infants, the main purpose of which was to avoid the incidence of income tax. Simonds, J., refused to exercise any discretion in favour of variation. He was not satisfied that the infant beneficiaries would suffer if the discretion was not exercised despite a power in the settlor to wind up the scheme under which they benefited. Apart from this the learned Judge, though not deciding the point, expressed grave doubts whether he would be entitled to exercise any discretion which would have the effect of avoiding tax under the guise of protecting the interests of the infants.

The case, of course, arose out of the provisions of the Finance Act, 1939, s. 14, and is noted only as a guide to the attitude of the Court. In times past the Court did not regard tax avoidance unfavourably, but recently a marked change is appearing in judicial pronouncements.

Sale of land—payment of agency commission—willing buyer but property sold to another person.—The claim for agent's commission on a sale of land has in the last few years been before the Courts more than once and the authorities were reviewed in *Luxor* v. *Cooper,* [1941] A. C. 108 (*ante,* Vol. 5, p. 294). Another case illustrates that one of the great difficulties in these cases is the construction of the actual contract entered into. In *Davies* v. *George Trollope,* [1943] 1 A. E. R. 501, an estate agent had offered his services in finding a purchaser for a certain property at half commission. The agent found a person willing to buy but at a slightly lower price. On that price being refused and although he had no authority from the buyer he said that he would take the responsibility of accepting at the higher figure on behalf of the buyer. The property was subsequently sold to another purchaser. The Court of Appeal held that on the contract before them no commission was payable. The contract was not a contract to introduce a person willing to buy, but to introduce a willing buyer. du Parcq, L.J., went further and said it was a contract to introduce a willing buyer whose sale went through.

In all respects the case was less complicated than *Luxor* v. *Cooper* (*supra*), but it is becoming increasingly difficult to determine (i) what is the contract which an agent has with his principal on the sale of land; and (ii) in what circumstances the principal can disregard the efforts of the agent to produce a willing purchaser. In any case any contract, and many of them are oral, must be scrutinised carefully for its particular terms. In *Luxor* v. *Cooper* (*supra*) the House of Lords was not impressed by arguments based upon "implied terms".

Sale of land—creation of tenancy.—Dunthorne & Shore v. *Wiggins,* [1943] 1 A. E. R. 577, is a case of some practical interest though peculiar.

The defendant had entered into an agreement to buy a property (controlled by the Rent, etc., Acts), which was subject to a subsisting mortgage, and to pay for the equity of redemption by giving a promissory note redeemable out of weekly payments, which were also to be employed to pay the mortgage interest, rates, etc. Under clause 3 the purchaser was to be allowed to enter on the property as tenant at will subject to ejectment for failure to maintain the payments. Bennett, J., held on the facts, which have only been very shortly stated in this note, that there was both a contract for sale and also a tenancy agreement for a weekly tenancy. He further held that the weekly payments were rent, that they exceeded the standard rent payable, and that as the premises were controlled by the Rent, etc., Acts, the amount of excess was recoverable.

Undoubtedly, the case was decided on its special facts. Its importance lies in the clear distinction drawn between payments that may be treated as rent, though quite clearly not so described, and sums payable by way of instalments of purchase money. Obviously it may not always be possible in any given transaction to be certain what is the character of the payment.

(1 K. & E., p. 407.)

Mortgage—duty of receiver to account to mortgagee.—Leicester Permanent Building Society v. *Butt,* [1943] 2 A. E. R. 523, raises an interesting point which, however, is unlikely to arise much in practice. The question was whether a receiver appointed by the mortgagee under his statutory power was bound to account to the mortgagee. The argument was that as the receiver was the agent of the mortgagor who was solely responsible (L. P. A., s. 109 (2)), therefore he was under no duty to account to the mortgagee. Bennett, J., however, held that he was under a statutory duty to do certain acts, some of which benefited the mortgagee (L. P. A., s. 109 (8)), and that, therefore, under the general principle laid down in *Groves* v. *Wimborne,* [1898] 2 Q. B. 402, an action would lie to enforce it. The learned Judge referred to *Woods* v. *Winskill,* [1913] 2 Ch. 303, against a receiver and manager for debenture holders who had neglected to perform the statutory duty of paying preferential creditors, and to *Liverpool Corpn.* v. *Hope,* [1938] 1 K. B. 751, where an action was brought against a receiver to recover unpaid arrears for rates. In this last case the local authority did not recover and the learned Judge distinguished it from the instant case on the ground that the corporation were not persons belonging to a class for whose benefit the statute imposed a duty, whereas the mortgagee was clearly here within a class so intended to be benefited by the Law of Property Act, 1925, s. 109 (8).

(2 K. & E., p. 82 (n.).)

Settlement—" first and other sons "—construction.—Re Gossett's Settlement, [1943] 2 A. E. R. 515, is really a point of construction and, it is thought, should not be taken far outside its context. The point in issue arose on a settlement by deed. There were a series of limitations in which the grant was to the grantee for life and then to " first and other sons and of the heirs male of the body and bodies of such first and other sons successively " or words to the like effect. The last limitation creating the estate tail omitted a reference to the fact that the estates were taken successively. Cohen, J., held that this omission was not sufficient to exclude the construction that such estates were to be held in succession; any other construction, such as that all the sons should take as joint tenants or tenants in common, was inconsistent with the instrument as a whole.

Actually, the learned Judge based his decision on the authorities and stated that they laid down a general principle, which was not confined to wills, that the words "first and other sons" connote successive interests. The learned Judge said that in his opinion the principle was established by *Lewis* v. *Waters* (1805), 6 East 336, followed in *Cradock* v. *Cradock,* 32 L. T. (o.s.) 48, and other cases.

The importance attached to the observations of Stuart, V.-C., in *Cradock* v. *Cradock* (*supra*) may be pointed out. These words have been adopted before, as, for instance, in *Re Harcourt,* [1920] 1 Ch. 492, where the same construction was put upon these words in a will. Nevertheless, it is important to note that the words connoted successive interests, but, as Cohen, J., pointed out, this would be the only construction which will bring the particular limitation into accord with the consistent scheme to be found in the settlement as a whole. We should say that "first and other sons" will be construed as conferring successive interests unless on the document as a whole another construction is required.

Settled land—waste—mining lease.—Re Fitzwalter, [1943] 2 A. E. R. 328, decides on the Settled Land Act, 1925, that a tenant for life need not be unimpeachable for waste generally to enjoy the benefit of section 47 of the Act as a tenant unimpeachable for waste. It also decides that on construction a tenant may be impeachable for waste by virtue of a provision cutting down what would have been an estate tail (not subject to waste) to a life estate by an accidental occurrence (in this case by the tenant being born in the settlor's lifetime), because the settlor had omitted to include words apt to free the tenant for life from liability for waste. The judgment of Lord Clauson (the single judgment of the Court of Appeal) contains some very interesting observations on the construction of the section by reason of the existence of decisions on a prior section (in the 1882 Act) similar in all material respects.

The facts were that the tenant for life being born in the settlor's lifetime took a life interest and not an estate tail, but his predecessor had granted certain mining leases under the statutory power. It was held that apart from the construction of section 47 the tenant for life could, though impeachable for waste, have worked open mines and taken the whole of the proceeds: *Re Hall,* [1916] 2 Ch. 488. In this case, however, the mines having been granted under the statutory power, the right to rents and profits of the tenant for life was limited by the Act. It was held, however, that a tenant for life was "unimpeachable for waste in respect of minerals", if he was unimpeachable in respect of the particular mines in question, following *Re Chaytor,* [1900] 2 Ch. 804.

(2 K. & E., p. 725, n. (*h*).)

Settled land—option to purchase—conversion by tenant for life.—Re Armstrong's Will Trusts, [1943] 2 A. E. R. 537, should be read in conjunction with *Re Cartwright,* [1939] Ch. 90, to show that in one aspect at least the strict settlement remains different from a trust for sale. Here the testator created a life interest and subject thereto his son was to have an option to purchase the land at a fixed price within twelve months of the widow's death. The widow as tenant for life sold the land for a sum considerably in excess of the fixed price of the option. Cohen, J., held, both on the construction of the will and on the construction of the Settled Land Act, 1925, s. 75 (5), that the son could exercise his option and take the extra value of the proceeds of sale. In so holding Cohen, J., distinguished *Re*

Flint, [1927] 1 Ch. 570, in which it was held that the effect of the statutory trust for sale was to destroy a right of pre-emption since the beneficial interest was converted into the proceeds of sale. It is to be noted that in *Re Flint* (*supra*), the right of pre-emption was not at a fixed price, but it is thought that even had it been so, the *ratio decidendi* would have led the Court to hold that the right of pre-emption would have been destroyed: cf. *Re Thomas*, [1930] 1 Ch. 194; *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; *Re Davies' Will Trusts*, [1932] 1 Ch. 338.

In *Re Cartwright* (*supra*), the question was essentially one which fell within section 75 (5), since it involved the devolution of the property on death. It was to be contrasted with the operation of the statutory trust for sale which operated to alter devolution just as section 75 (5) operated to retain devolution notwithstanding the actual conversion into proceeds of sale: cf. *Re Kempthorne*, [1930] 1 Ch. 268, on the statutory trust for sale. *Re Armstrong*, it is submitted, goes rather farther than *Re Cartwright*. Cohen, J., held that the option to purchase was an interest in land, following *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562, and that, therefore, it was an interest protected by section 75 (5) and that the trustees held the proceeds of sale of the settled land and any investments representing the same upon trust to sell them to the owner of the option should he so desire. The decision emphasises the fact that the interests under the trust instrument are primarily interests in a trust fund and not in particular items of property. This is, of course, consistent with *Re Liberty's Will Trusts*, [1937] Ch. 176, though it is a point of view that does not seem yet to be adopted as a general principle. Once it is adopted it would seem difficult to suggest, except as a matter of express construction of a particular instrument, that a change in the character of the trust fund could alter the rights of the beneficiaries. Obviously from the point of view of construction such changes might be very material. It should be observed that a right conferred upon a beneficiary under the trust instrument, which is not itself an interest in property but only a personal right, is not protected by the decision. A change in the character of the trust fund might operate to destroy such a right.

From a drafting angle, however, it becomes important to decide in these cases of options what particular machinery is to be adopted. If it is desired to preserve the land for a son it would seem that the object can really be achieved only by giving it upon trust for sale and during the life of the widow restricting any sale by requiring the consent of the person to have the option. This is, of course, an absurd device on the face of it, but it is easier to prevent sale during the life of a tenant for life under a trust for sale than under a settled land settlement. Manifestly the law has become so artificial as to be absurd, but this is apt to happen when piecemeal statutory interference does not view the aim as a whole.

(1 K. & E., p. 514 (16); 2 K. & E., p. 914, n. (*t*).)

Power of appointment—perpetuity—fluctuating income.—The application of the perpetuity rule to the exercise of special powers of appointment demands peculiar vigilance and two cases just reported emphasise this point. In a special power the perpetuity period runs not from the date of the exercise of the power but from the date of creation of the power. The consequence that most frequently arises for consideration is that objects of the power are frequently not *in esse* at the date of the creation of the power and, therefore, not lives for the purposes of the rule. On the other hand the donee of the power is usually a life in being and the length of period not infrequently falls to be measured by that life.

An excellent example is to be found in *Re Johnson's Settlement,* [1943] 2 A. E. R. 499. Here the donee of a power created by her *marriage* settlement appointed in favour of three daughters, directing that the trustee should apply the income for the life of each daughter and after the death of each daughter to give the property to such of the children of the daughters as should be born within twenty-one years of the death of the *appointor,* but if there were no such children then the share of such daughter should vest in such of the other daughters as survived the deceased daughter.

In the events which happened daughter Mary had no children. Now it is submitted that had she had children their interest could vest because it must do so within twenty-one years of the appointor's death, which was the period for the purposes of the rule. On the other hand, as it would not become clear who would take a vested interest in default of children until the death of the daughter, since vesting was postponed to the daughter's death, this was void for perpetuity as was apparently agreed by all parties under the decision in *Re Legh's Settlement,* [1938] Ch. 39. Had the interest been determined by vesting in survivors at the date when the children could have taken a share all would have been well.

Actually *Re Johnson* (*supra*) and *Re Pratt's Settlement Trusts,* [1943] 2 A. E. R. 458, were concerned with the effect of an absolute gift followed by a gift over which was void for perpetuity. In *Re Pratt* it was argued whether by virtue of *Doe d. Blomfield* v. *Eyre,* 5 C. B. 713, an absolute gift followed by a gift over which was void would be cut down and become a defeasible interest. In *Doe* v. *Eyre* (*supra*) the donee of the power appointed to her son with a gift over to a stranger if the son died in the lifetime of the donee's husband. The son did so die and the Court of Exchequer Chamber held that the son's interest failed on his death. In *Re Pratt* (*supra*) the donee appointed under her marriage settlement in favour of a son absolutely but if he died without leaving issue then over to another son. It was agreed that the gift over failed for perpetuity, since clearly the event might occur more than twenty-one years from the death of the donee. Cohen, J., held, following *Re Brown & Sibley's Contract,* 3 Ch. D. 156, that a gift over void for perpetuity did not cut down an absolute gift and so make it defeasible but only the remote limitation was avoided. The learned Judge adopted the reason for this exception to the rule in *Doe* v. *Eyre* given in *Jarman on Wills,* vol. 2, at p. 1410, namely, that where a contingency is void for remoteness the law refuses to await the contingency for any purpose.

His Lordship, however, took occasion to draw attention to the observations of Lord Buckmaster in *Bourne* v. *Keane,* [1919] A. C., at p. 874, where the learned Law Lord pointed out that where there have been decisions of long standing (such as *Re Brown & Sibley's Contract*) which may determine the construction of a doubtful statute or affect the title to property they ought not to be altered unless it is possible for the Court to say positively that any such decision was wrong and productive of inconvenience.

In *Re Johnson's Settlement* (*supra*) the issue to be decided was concerning the gift over under the will, namely, whether or not an absolute gift was created by an appointment to the trustees of the will in trust for the objects in equal shares and so that with the exception of the gifts to A the respective shares of the objects should be subject to certain provisions. The presence of the exception to A, who clearly took an absolute interest, distinguished this case from *Rucker* v. *Scholefield,* 1 Hem. & M. 36, and the learned Judge was able to hold that all the parties took absolute interests, the ultimate gifts over failing for perpetuity.

But *Re Johnson's Settlement* is more important for its discussion of attempts to provide stable income. The appointor had directed that during the lives of her daughters their income should be made up to £400

per annum and, if necessary, this was to be provided out of capital under her marriage settlement. On the one hand it was argued that, by virtue of the decision in *Re Cassel,* [1926] Ch. 358, the daughter took an immediate vested interest to an income of not less than £400 per annum out of capital and income, and on the other, by virtue of the decision in *Re Whiteford,* [1915] 1 Ch. 347, that the daughter only took a contingent interest in the capital that might never arise.

In *Re Cassel* (*supra*), Russell, J. (as he then was) upheld a direction to pay out of capital rates and taxes, etc., in connection with a lease during the life of a beneficiary taking under the will on the ground that the payments, though variable, began within the period. It was also argued that there was no real distinction in *Re Johnson's Settlement* between the gift made and an annuity free of tax; an illustration which assisted Russell, J., in coming to his decision. This latter argument was disposed of on construction and Cohen, J., drew attention again to the words of Lord Greene, M.R., in *Re Legh's Settlement* (*supra*) that interests must be construed in the first place without reference to the perpetuity rule and, though framed another way substantially the same gift could be made without a perpetuity, the Court must refrain from the temptation to construe a particular gift to avoid the consequences of remoteness.

Cohen, J., followed *Re Whiteford* (*supra*) and held that the gift was void for perpetuity. In *Re Whiteford* Neville, J., had held that a gift of income to be divided between four sons of whom one was to have an income of not less than £200 per annum was void for remoteness, the sons not being lives *in esse*. In so holding Cohen, J., definitely took the view that he was not deciding that *Re Cassel* and *Re Whiteford* were inconsistent and that, therefore, he must follow *Re Whiteford* as involving identical reasoning. The point being that the interest, if any, in the capital was uncertain from year to year and might never vest at all. In *Re Cassel* (*supra*) the liability to pay rates, etc., must arise and only the amount could be uncertain.

Gray on Perpetuities (4th ed.) at pp. 259, 260, takes the view in fact that *Re Cassel* was wrongly decided and is inconsistent with *Re Whiteford*—the learned editor remarking: "it is difficult to support this decision [*Re Cassel*] on principle or to distinguish it from *Re Whiteford* which does not appear to have been mentioned by either court or counsel". It is not easy to see how a share of capital of uncertain amount is to be distinguished from such share in the income of the residuary estate as is necessary to pay rates, etc. The distinction becomes more difficult when it is recalled that *Re Whiteford* was concerned with a share of income and not of capital.

It may be finally observed that these cases also illustrate another vital point about the perpetuity rule. It is not the rule which is really difficult but the determination whether an interest is vested or contingent which presents the problem. Since the decline in importance of the strict rules of expectant interests too little has been said of the definition of "vested" and "contingent".

(2 K. & E., pp. 1050, 1055.)

Discretion under Trustee Act, 1925, *s.* 57—*power to vary investments—specific bequest of specific shares.—Re Pratt,* [1943] 2 A. E. R. 375, is a useful decision on two points: (i) the Court cannot exercise a discretion to make an order under section 57 of the Trustee Act where the trustees themselves have a discretion to act; (ii) the power to vary investments under section 1 of the Trustee Act enables the trustees to sell investments held by them under a specific bequest independently of any power to vary

investments under the trust instrument. Such a power is, of course, subject to any contrary intention in the trust instrument.

In the instant case the testatrix had bequeathed certain shares to be held by the trustees upon trust for persons in settlement. One of the trustees wished to have the shares sold and so took out a summons asking that the Court would authorise the sale. Morton, J., held that (a) section 1 of the Trustee Act applied even where the trust fund consisted of investments specifically bequeathed, basing his opinion upon observations in *Hume* v. *Lopes,* [1892] A. C. 112, and that (b) the power to vary investments conferred upon the trustees a power to sell existing investments for that purpose. Consequently, section 57 of the Act did not apply.

The effect of the decision is undoubtedly convenient from the point of view of trustees, but it is possible that it may not fall in with the views of all testators. Consequently, since a contrary intention expressed in the trust instrument will exclude the Act a draftsman should consult his client on the point where the settlement is of specific investments which it is intended to constitute the primary trust fund.

Tithe Redemption Commission—jurisdiction to determine the existence of tithe rentcharge.—Tithe Redemption Commission v. *Wynne,* [1943] 2 A. E. R. 370, is important to conveyancers because the Court of Appeal have held that for the purpose of apportioning a tithe redemption annuity the Tithe Commission has jurisdiction to determine whether or not at the material time a tithe rentcharge was issuing out of any particular parcel of land. The decision so given by the Tithe Commission is final and conclusive. It will be observed that this means in effect that certain highly technical legal rights will be determined by an order of a tribunal not subject to appeal and not a law Court in the ordinary sense. The decision is of general importance in view of the possibilities that may arise under proposals for planning. Much more far-reaching questions may drift into the hands of similar Commissions if legislation is not scrutinised in its inception. That may be a good thing or a bad thing, but it is well to be prepared.

Statutory trust for sale—discretion to refuse to sell.—Re Mayo, [1943] 2 A. E. R. 440, carries the peculiarities of the effect of creating statutory trusts for sale one stage further. A testator devised his realty to his wife for life and subject thereto to his son for life as to one moiety and to his daughter he devised the property in fee simple but as to one moiety subject to the son's life interest. During the widow's life there was a settlement for the purposes of the Settled Land Act, 1925, but on her death the property was held on the statutory trust for sale created by the Settled Land Act, 1925, s. 36. It so happened that son and daughter were also the trustees for the purposes of the Settled Land Act, and so they were the statutory trustees for sale. The son wished to sell the property, but the daughter did not. Simonds, J., held that no *mala fides* on the part of the trustee wishing to sell being shown (or, indeed, in this case suggested) the learned Judge was bound to direct the respondent trustee, the daughter, to join with the applicant trustee, the son, in selling. All the trustees must agree to exercise the statutory power to postpone: *Re Hilton,* [1909] 2 Ch. 548.

It will be observed that the trustee, having a life interest in the moiety, could override the wishes of the trustee who was absolutely entitled to the whole property subject only to this life interest. Had there been no statutory trust for sale but only a power to sell, the position would have been reversed. The power can only be exercised if the parties all agree.

In this particular case the property was not given to trustees upon trust for sale; the settlement began as a Settled Land settlement and would so have continued to the end but for the almost accidental fact that the land became vested in equity in persons entitled in undivided shares.

It seems highly probable that in most similar cases to the present the testator would wish that the property should not be sold without the daughter's consent. There is no decision yet whether this would be valid as against a statutory, as distinct from an ordinary, trust for sale, though an express agreement between the parties can have this effect: *Re Buchanan-Wollaston,* [1939] Ch. 738. The result could have been achieved by making the son and daughter joint tenants for life, which would have excluded section 36 of the Settled Land Act: see S. L. A., s. 19 (2).

Easement, right, privilege and benefit—statutory interests and definition.—Fitzwilliam's Collieries v. *Phillips,* [1943] 2 A. E. R. 346, is primarily a Revenue case on liability to income tax and as such not important on the general property law, but the *ratio decidendi* may be of importance in determining the construction of some of the more general property statutes. Under a mining lease the colliery company covenanted to pay certain sums as liquidated damages for causing subsidence to the surface in the course of mining. It was important to determine whether this right to cause subsidence was an "easement" as defined by the Finance Act, 1934, s. 21. By the Act easement is defined as "any right, privilege or benefit in, over or derived from land". It was conceded that the right could not be an easement at Common Law by reason of the decision of the House of Lords in *Elliott* v. *Burn,* [1935] A. C. 84. It was held that the rights conferred on the colliery company to interfere with the surface subject to the payments were an "easement" for the purpose of the Finance Act, 1934. Lord Russell (with whose opinion Lord Simon and Lord Macmillan concurred) said (at p. 348): "While I think that *Elliott* v. *Burn* is an obstacle in the way of my holding that the lessee has any right in over or derived from the surface land or any benefit or privilege in or derived from the surface land, it is in my opinion . . . possible to say that cl. 2 (1) [of the lease] confers on the lessee a privilege over the surface land. . . ." Lord Wright, in delivering a concurring opinion, was careful to point out that he regarded the words in the Act as "popular in character": the actual words, he said, "are not words of art or such as a conveyancer would use" (at p. 349).

This last remark of Lord Wright gives pause for reflection. Land is defined in the Law of Property Act, 1925, s. 205 (1) (ix), to include "an easement right privilege or benefit in over or derived from land" and the same definition will be found in other of the 1925 Acts. This Act is a conveyancing Act drawn by an eminent conveyancer for conveyancers. Furthermore, the Acts do constantly bracket together "easement right and privilege in over or derived from land" and it will be noticed that Lord Russell defined the right in the instant case as a "privilege over land".

Now the importance of this decision in *Fitzwilliam's Collieries* v. *Phillips* (*supra*) lies in the possibility that it may be applied beyond income tax. Indeed, it is not very easy to see why it should not, since we thought that such statutes should be construed strictly in favour of the subject and, as Lord Romer's dissenting speech shows, the opposite view could have been taken. If the decision is to be applied outside the Revenue cases it may have some peculiar effects. Of these it is possible that the most far-reaching will lie in the realm of registered land. Under the Land Registration Act, 1925, s. 18 (1), a registered proprietor can "grant in fee

simple in possession *any* easement right or privilege in over or derived from the registered land". Under Rules 257 and 258 an "easement right or privilege" shall not be entered on the register except as appurtenant and then only if capable of subsisting as a legal estate, but rights, privileges and appurtenances appertaining or *reputed* to appertain to the land are "overriding interests". The definition of land in the Land Registration Act, 1925, also includes "an easement right privilege or benefit in over or derived from land": section 3 (viii). If a privilege is sufficiently an interest in land to tax it as an "easement" is it not, under these rather complicated provisions, also sufficiently an interest in land to become binding on successors in title and in effect become a new class of what in unregistered land we should call an incorporeal hereditament? Manifestly the principle is not confined to the particular example. But we have long felt some difficulty with these provisions and others like them because, in our opinion, their true construction is by no means obvious and the usual view that they are to some extent verbiage that has not affected the old law is open to serious question.

Charities—nature of charitable bequest—capital and income—perpetuity.—Re Corelli, [1943] 2 A. E. R. 519, and *Re Price,* [1943] 2 A. E. R. 505, should be compared since they illustrate the gulf between valid and invalid gifts for public purposes that may not be charitable.

In *Re Corelli* (*supra*) the testatrix had bequeathed a house and other property for its maintenance. The house was to be used for the establishment of "breathing spaces and air zones" in a particular locality and for "the promotion of science, literature and music" in that place, but it was also to be used as a hostel for the entertainment of distinguished visitors. Cohen, J., held that it was not a good charitable gift and as the income only was to be employed it failed for perpetuity.

In the course of his judgment the learned Judge laid down the following rules that he had extracted from the cases. (i) The fine arts are not in themselves charitable unless they are associated with instruction: cf. *Royal Choral Society* v. *Inland Revenue,* [1943] 2 A. E. R. 101. (ii) A trust for the benefit of the inhabitants is charitable (*Goodman* v. *Saltash,* 7 App. Cas. 633), provided that the objects are not too uncertain (*Houston* v. *Burns,* [1918] A. C. 337), because if they are certain they may become charitable by association with inhabitants of a locality though not otherwise charitable: *Re Spence,* [1938] Ch. 96. (iii) A trust for the benefit of a profession is not as such charitable: *General Medical Council* v. *I. R. Commrs.,* 97 L. J. K. B. 578. Consequently, the learned Judge would have held the trust charitable had it been limited to the two first objects named because they were associated with a particular locality, but he held that the third object was dominant and that it was not charitable.

In *Re Price* (*supra*) the testatrix gave one-half of her residuary estate to the Anthroposophical Society "to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner". Cohen, J., held that the gift was not made to individual members of the society but to the society though an unincorporated body, that the gift was a gift of capital and income to be used at the discretion of the chairman and executive council and was good whether or not the gift was charitable, but he also held that it was a good charitable gift.

In the course of his judgment Cohen, J., laid considerable emphasis on an unreported case, *Macaulay* v. *O'Donnell* (Cases on Appeal to the House of Lords, vol. 775, p. 42) concerning a gift to the Folkestone Lodge of the Theosophical Society. In this case before the House of Lords apparently it was also argued that the gift could succeed if either it was a

gift of capital and income to be spent at discretion, or if it was limited to income provided the gift was charitable.

Obviously, in default of express instructions in the will, it is a question of construction pure and simple whether or not the beneficiaries have a discretion to dispose of capital. However, it is worth pointing out that in *Macaulay* v. *O'Donnell* (*supra*) the House of Lords took a different view of the particular will from the Courts below on this point. Essentially, if the gift is to maintain something it is probably a gift of income only, but if it is a gift that something may be done—as, for example, carrying on the teachings of Rudolf Steiner—then it may easily be a gift of capital as well as income.

If it is a gift of capital and income it will still fail if there is uncertainty of purpose: *Re Drummond,* [1914] 2 Ch. 90. In the instant case the learned Judge was satisfied that the teachings of Dr. Rudolf Steiner, though multifarious, were ascertainable and departure from them could be challenged before the Court.

On the question whether the trusts were charitable the learned Judge distinguished *Re Hummeltenberg,* [1923] 1 Ch. 237, because he had held the trusts were not so uncertain that the Court could not undertake their administration. Secondly, the gift *might* operate for the public benefit because it was directed to the mental or moral improvement of man and was not *contra bonos mores,* though the learned Judge did not seem to feel that he personally would benefit from it. Again, he cited *Macaulay* v. *O'Donnell* (*supra*) in support of his contention. It is not apparently necessary to satisfy the Court that the educational trusts must operate to benefit the community, but only that they be for the mental or moral improvement of man.

(2 K. & E., 299.)

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2. *WILL CASES.*

Acceleration—annuities—disclaimer of life interest.—Re Hodge, [1943] 2 A. E. R. 304, is of interest because it extends the principle of acceleration to another class of property, namely, annuities. By her will the testatrix gave a life interest to X and, subject thereto, directed certain annuities to be paid out of an appropriated fund and, subject thereto, the property was to be held on trust for sale. It was directed that the annuities should be paid three months after the death of X. X disclaimed his life interest. It was not contended that the trust for sale was accelerated so that the beneficiaries took an immediate interest. Simonds, J., held that the annuities became payable three months after the disclaimer.

The learned Judge said that the principle of acceleration was first established in regard to real estate and probably the origin was to be found in the technicalities of real property law. The principle had become extended to personalty and the learned Judge could see no reason why it should not be extended to a partial interest such as an annuity. The direction to pay three months after the death of X he regarded as merely an administrative provision which was to be construed as meaning three months after the determination of X's interest, whether by reason of death or otherwise.

Although acceleration began with the law of real estate, its application to legal contingent remainders was peculiar: see *Brudenell* v. *Elwes,* 1 East 442; *Re Scott,* [1911] 2 Ch. 374, doubted in *Re Brooke,* [1923] 2 Ch. 265. The point was, of course, that the unnatural determination of the prior particular estate defeated the remainder altogether. In the case of powers of appointment, whether over realty or personalty, the position

is different yet again. If there is an excessive exercise in favour of a person not an object of the power there will be no acceleration in favour of an object taking in remainder unless there is a contrary intention: *Crozier* v. *Crozier*, 3 Dru. & War. 350; *Line* v. *Hall*, 43 L. J. Ch. 107.

The law affecting legal contingent remainders can, of course, only apply to instruments executed some time ago, because the general rule of acceleration, apart from contrary intention, applies to equitable contingent remainders: *Re Conyngham*, [1921] 1 Ch. 491. But powers of appointment will remain outside the general rule although it would seem to apply to almost any other interest in property.

Executory trust—"for my said daughter's benefit and that of any children she may have"—meaning of children.—Re Potter's Will Trusts, [1943] 2 A. E. R. 284, turns upon its special facts for construction, but it is relevant to show how important phraseology may be in only slight variations. The testator had left a share of residue in the events which happened upon trust that it should be secured by settlement "for my said daughter's benefit and that of any children she may have". The trustees settled it upon the daughter during the joint lives of her and her husband and after her death upon trust for the children of the marriage. In fact the daughter survived the marriage and had children by another husband. These latter children brought an action on the ground that the trustees had no right to exclude them under the marriage settlement. Bennett, J., held that the trustees only held on an executory trust and therefore had some discretion in modifying the trusts: *per* Kay, J., in *Nash* v. *Allen*, 42 Ch. D., at p. 59. This discretion, in the view of the learned Judge, entitled the trustees to select from amongst the daughter's children the beneficiaries to take under the settlement. They were only bound to exercise their discretion for the benefit of the daughter and some of her children. It will be noticed that the selection might have been by age, *e.g.*, the children attaining twenty-one or, presumably, by sex as, for instance, only female children.

The learned Judge also expressed the opinion, though it would seem *obiter*, that with the words used it would not in appropriate circumstances have been improper to include a benefit for the children of any marriage, thereon distinguishing the words actually used from the common form "by a settlement for my daughter and her children". Whether, had the common form been used, the learned Judge would have felt himself constrained to hold that all the children must take a benefit he did not say. It must not be assumed that the decision would go the same way, nor must such an assumption be made where the executory trust does not include a power of appointment in the daughter which was expressly mentioned in this case.

Partial intestacy—intestacy as to income during a life—destination of income.—In a sense, *Re Plowman*, 112 L. J. Ch. 229, is the converse of *Re McKee*, [1931] 2 Ch. 145, which was much relied upon by Cohen, J., in his judgment in the later case. In *Re McKee* (*supra*) it was held that section 33 of the Administration of Estates Act, 1925, did not apply to a partial intestacy where there was a failure of a gift over after a life interest, that there was no immediate trust for sale of the reversionary interest, and that the life tenant, the widow, was not immediately entitled to her charge of £1,000 which was payable to her personal representatives on her death. In *Re Plowman* (*supra*) the testator had directed his residuary estate to be divided among charities after his wife's death, but had made no effective

gift of income during his wife's life. He left no children, but his wife survived him. Cohen, J., held that the income was subject to a first charge of £1,000 with interest at 5 per cent. from the testator's death and subject thereto the income was payable to the widow and was not to be invested and the interest from the investment only be payable to the widow. The principle involved appears to be that the income is "income" of a "residuary trust fund" and as such is, in default of issue, payable to the widow: A. E. A., s. 46; and the learned Judge referred to *Re Thornber,* [1937] Ch. 29, as assisting him in this conclusion.

Since the widow was entitled to both the charge of £1,000 and the income the effect was that the income was wholly payable to the widow. Had there been issue, apparently the widow would have been entitled to her charge of £1,000, etc., and, subject thereto, to half the income after the £1,000 had been discharged.

Inheritance (Family Provision) Act, 1938—*maximum amount of income applicable—admissibility of evidence.—Pugh* v. *Pugh,* [1943] 2 A. E. R. 361, is of interest because it carries the general principles of the application of the Inheritance (Family Provision) Act two stages further. In this case the testator had left the residue of his property to his widow, but had made a specific devise of his real property to a grandson who was not a dependant. In fact, the widow roughly obtained 18/68ths out of the property left by the testator. Evidence was tendered that the testator had said a number of times shortly before his death that all his property was to go to the widow. Morton, J., held that the evidence was not admissible. It only displayed intention and did not explain the testator's reasons for the dispositions that in fact were operative. This evidential point may be of considerable importance having regard to the relaxation of the general rules provided by the Inheritance, etc., Act, 1938, s. 1 (7).

It was argued that in order to ascertain what was the maximum amount which the Court could order, a gift of a capital sum, including, as in this case, a gift of residue, must be converted notionally into an annuity and that notional annuity must be added to the income of the rest of the property to find out what was the total income in respect of which the order was to be made. The learned Judge declined to accept this argument. He held that it was the income of the property and not the notional benefit which might be obtained if the capital sum was invested in an annuity which governed the jurisdiction. This is important because, save in estates not exceeding £2,000 (see *Re Catmull,* [1943] 2 A. E. R. 201, noted *ante,* p. 42), the Court can only make a direction to pay income for life.

On the particular facts of the case the learned Judge refused to make an order in favour of the widow. He reiterated the principle he laid down in *Re Styler,* [1942] Ch. 387 (noted, *ante,* vol. 7, p. 44), that the Court should not interfere merely because the learned Judge would himself have made more ample provision for the dependant. The Court has to find that the provision made by the testator was unreasonable. In coming to the conclusion that the provision was not unreasonable, Morton, J., took into account the fact that the widow was given a capital sum which she could turn to account as she wished.

(2 K. & E., p. 886.)

Guardianship—jurisdiction of Court to appoint when infant has no property.—Re D., [1943] 2 A. E. R. 411, need only be shortly noted. Certain refugee children without property were within the territorial jurisdiction. As their parents were still abroad it was desired to appoint

guardians. Bennett, J., held that the jurisdiction is based " upon the need of an infant for protection ". On the particular facts the learned Judge made an appointment.

In the course of his judgment the learned Judge alluded to the practice of settling small sums upon an infant in order to make such infant a ward of Court. To the mind of the learned Judge this practice appears to have seemed inconsistent with the jurisdiction which he exercised. It is submitted, however, that this is not quite so. The usual purpose of this practice is to give rapid control to the Chancery Division so that an injunction against interference with the infant can be obtained on motion. Now, so soon as this settlement is made, quite simply by payment of the sum into a bank in the name of the trustee, a writ can be issued to determine the trusts. The issue of this writ immediately operates to make the infant a ward of Court.

In the case of a summons or petition for a guardian the infant becomes a ward of Court only apparently on an order being made: *Stuart* v. *Marquis of Bute,* 9 H. L. C. 440.

Vested and contingent legacies—date for payment of interest.—Re Pollock [1943] 2 A. E. R. 443 comes as a timely reminder that the rules governing the payment on pecuniary legacies are highly technical and not to be construed by the light of nature. It also deals with two interesting points. A pecuniary legacy was given to the widow to be paid " immediately after my death ". Bennett, J., held that this made the legacy bear interest as from the date of death, following *Re Riddell,* 155 L. T. 247.

Another pecuniary legacy was given to trustees " upon trust for my said son . . . if he shall attain the age of twenty-five years absolutely " with a gift over. The son was an infant. Bennett, J., held that this legacy was not a gift to a person to whom the testator stood *in loco parentis* because it was a gift to the trustees and not to the son. Following *Re Medlock,* 55 L. J. Ch. 738, the learned Judge held that the legacy carried interest at 4 per cent. from one year from the death. This interest is to be treated as income from the legacy and may be used for the maintenance of the son and subject thereto should be accumulated and pass with the capital value of the legacy.

On wider grounds this decision is not without interest. Of recent years there has been a growing tendency to treat equitable or beneficial ownership as the real ownership: see *Baker* v. *Archer-Shee,* [1927] A. C. 844, though this tendency has not always been followed: *Schalit* v. *Nadler,* [1933] 2 K. B. 79. In the case noted, Bennett, J., certainly seems to have adopted the second view. To hold that it was not a gift to the son but to the trustees seems to put the beneficial interest in a position far removed from ownership. Although technically the gift was to trustees upon trust for a person to whom the testator stood *in loco parentis,* the bequest did not even take effect as an immediate interest of a Common Law right, because the trustees could not claim as such immediately. Indeed, it would not normally be possible to create beneficial interests of the character desired by the testator except as equitable interests, because the Common Law declined to recognise interests in succession in personalty. It is true that it is possible to have an executory bequest of pure personalty in a will operating at law at the present day, but it is most unusual in a professionally drawn will not to rely upon trustees.

This, therefore, seems to be a particularly strong case in which to draw the distinction between a bequest and the beneficial interest in a bequest and is a timely reminder that, notwithstanding the Judicature Act, law and equity remain distinct.

(2 K. & E., p. 850, n. (*c*).)

Annuities—deficiency of income—method of dealing with arrears.—Owing particularly to a tendency to give annuities free of income tax and to the decline of income due to war contingencies of some trust funds, fixed annuities charged on a capital sum tend to exceed the income available. In *Re Lord Westbury's Settlement,* [1943] 2 A. E. R. 463, the annuities were a number of years in arrear. Cohen, J., held that the deficiency should be paid out of capital each year as the annuity fell due, without right to resort to future income to recoup the capital: *Re Croxon,* [1915] 2 Ch. 290. Where arrears are made up by payments out of capital the payment must be treated as being intended to make up the deficiency in regard to the year of payment, but any surplus must be set off against the earliest arrears by an analogy with *Clayton's Case.* The income tax will be treated as payable in accordance with the year of the payment.

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Rent Restrictions Acts—earlier judgment for possession and arrears of rent—whether tenant now estopped from raising any question as to the amount of the standard rent.—In *Griffiths* v. *Davies* (1943), 112 L. J. K. B. 577, an important question was decided by the Court of Appeal as to the effect of a previous judgment for rent based on a rate of rent which the tenant now seeks to challenge as excessive.

In 1933 judgment was given against the tenant for possession, suspended while she paid current rent (which was 10s. per week under the contract of tenancy) and 2s. 6d. per month off the arrears. There was also judgment for the amount of rent in arrears. No question was raised in those proceedings as to whether the contractual rent of 10s. per week was the lawfully exigible rent under the Rent Restrictions Acts. Now, in 1942, the tenant (the parties to the contract remained the same) had made an application in the county court under section 11 (1) of the Rent ond Mortgage Interest Restrictions Act, 1923, to determine the amount of the standard rent. The county court having decided that the matter was *res judicata,* in view of the earlier judgment which admittedly was based on the rate of rent which it was now sought to question, the case came before the Court of Appeal.

The principle which the Court of Appeal applied to this case was the rule that where there is a statutory direction or prohibition, it cannot be defeated by a previous judgment between the parties. Lord Greene, M.R., cited the House of Lords decision in the Irish case of *Bradshaw* v. *M'Mullan,* [1920] 2 Ir. R. 412, where the matter is dealt with by Lord Shaw at p. 425, and the Privy Council decision in *Maritime Electric Co.* v. *General Dairies, Ltd.,* [1937] A. C. 610, at p. 622. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, contains a prohibition against making any increase of rent in excess of the amount permitted under the Acts. "This", in the words of the learned Master of the Rolls, "is a statutory direction to the Court to abstain from giving a judgment for recovery of rent which is shown to the Court to be excessive."

Therefore, although in a previous action in respect of an earlier rent period judgment has been given for the amount of the conventional rent, the question whether that is in excess of the rent permitted under the Acts not having been raised, the Court is now bound to give effect to the provisions of the Acts limiting the amount of the lawfully recoverable rent once it is shown that the conventional rent is too high. This principle will be followed whether the tenant raises the matter in another action against him for alleged arrears of rent or for possession or, as in this case, himself brings

the matter before the Court in an application under section 11 of the Act of 1923 to have the amount of the standard rent determined. The Court is bound to entertain that application and consider the question what is the standard rent of the house in accordance with the Acts. The determination of the Court on this application will then decide what is the rent lawfully exigible in future, and will also give rise to a claim for the recovery of any overpayments made within the last two years (Act of 1923, s. 8 (2), as amended by section 7 (6) of the Act of 1938); but the Court of Appeal made it clear that the Court was not in any sense suggesting that the tenant, if successful in his contention that the contractual rent he had been paying was too high, could get behind the judgment of 1933 and say that the amount of that order must now be reduced. It seems clear from section 8 (2) of the Act of 1923 that the only retrospective effect which the decision of the Court as to the standard rent can have, is to make two years' overpayments recoverable, and no more.

(Woodfall, 24th edition, p. 364.)

Rent Restrictions Acts—house required for occupation by agricultural worker—adequacy of certificate of War Executive Agricultural Committee which does not name or identify the proposed employee.—In *Pickford* v. *Mace* (1943), 59 T. L. R. 364, the landlord sought to recover possession of a house under the provisions of paragraph (g) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Under that paragraph the landlord has to show that the house is reasonably required by him for occupation as a residence for some person engaged in his whole-time employment or in the whole-time employment of some tenant from him or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into, and either—(i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment; or (ii) the Court is satisfied by a certificate of the County Agricultural Committee (now the War Agricultural Executive Committee) that the person for whose occupation the dwelling-house is required by the landlord is, or is to be, employed on work necessary for the proper working of an agricultural holding or as an estate workman on the maintenance and repair of the buildings, plant or equipment of agricultural holdings comprised in the estate.

In this case the landlord was able to satisfy the county court as to the first part of the above requirement, namely, that the house was reasonably required by him for occupation as a residence for some person who satisfied the conditions laid down regarding his employment or prospective employment, but the certificate of the War Agricultural Executive Committee which he tendered in order to satisfy the second requirement of the paragraph had been furnished at an earlier date when the identity of the proposed employee was not known and he accordingly was not named in the certificate. Moreover, although the nature of the employment was known to the committee (as it would have to be if the committee was to exercise properly its function of deciding whether the work was necessary for the proper working of an agricultural holding) they had not specified the nature of that work on the certificate.

It was held by the Court of Appeal that it was not necessary for the certificate to name the proposed employee, and that it was not even necessary for the certificate to have been in respect of an identifiable individual at all. It is sufficient if the committee grant the certificate in respect of a class of employment, and then the certificate may be used in support of an

application for possession of the house for occupation by any worker in that class. Obviously it is desirable for the committee to state in their certificate the class of employment for which it is granted, but this is not essential if the particular type of worker can be identified by extrinsic evidence. The Master of the Rolls, in a careful judgment, referred to the unreported case of *Knight* v. *Winter*, decided in the Court of Appeal on April 24, 1942, wherein the same principles were followed as to the validity of a certificate referring simply to an unidentifiable person.

The judgment of MacKinnon, L.J., is worth citing for the succinct principles which he stated regarding the operation of paragraph (g) of this Schedule: " (a) It is not necessary for an applicant to the war agricultural committee to have made a contract of employment with a particular worker before he so applies. (b) It is not necessary for him to specify any particular person with whom he proposes to contract before he so applies. (c) It is sufficient when he applies to the committee to specify the class of worker whom he desires to engage. (d) It follows that it is not necessary for the committee in its certificate to mention the name of the proposed employee, and the committee may issue their certificate of a worker of a particular class without having any specific worker of that class in their mind. (e) It is desirable for the committee in its certificate to state the class of worker in respect of whom an application has been made to them ".

It was made clear by the learned Lord Justice that (e) was a recommendation which he made for the smooth working of the machinery, though not an essential of a valid certificate under the paragraph.

(Woodfall, 24th edition, p. 299.)

Rent Restrictions Acts—built-in furniture—whether " furniture " within the meaning of the Acts.—The effect of section 12 (2), proviso (ii) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and of section 3 (2) (b) of the Rent and Mortgage Interest Restrictions Act, 1939, as amended (in each case) by section 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, is that the Acts do not apply, save as otherwise expressly provided, to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture, provided however that a dwelling-house is not to be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

This important relaxation of the control provisions of the Rent Restrictions Acts, in favour of those dwelling-houses which are let with board, attendance or the use of furniture, had already raised some questions as to what is furniture within the meaning of the provision. In the Divisional Court case of *Crane* v. *Cox*, [1923] W. N. 41, a distinction was drawn between articles which were fixtures and those which were furniture, and it was held that gas cookers and fires, lighting fitments and blinds were not furniture within the meaning of the section. Shortly after, however, the Court of Appeal had recognised, in *Wilkes* v. *Goodwin*, [1923] 2 K. B. 86, that linoleum, even though fixed to the floor by nails, might be " furniture ", this being a question of fact for the County Court Judge to decide. These cases, though touching upon the problem, did not go to the heart of the question what really distinguishes and defines " furniture ".

Now the whole matter has been discussed very thoroughly in the Court of Appeal in the case of *Gray* v. *Fidler* (1943), 59 T. L. R. 449, where the

issue was raised over the question of built-in fitments serving the purpose of furniture but actually attached to the fabric of the house in the manner of fixtures. The decision of the Court of Appeal was only a majority decision, the Master of the Rolls dissenting. In view of this, and of the considerable importance of the case in relation to the large number of modern dwelling-houses, particularly flats, let with built-in fitted furniture, it will be interesting to see whether the question is taken any further.

The articles the subject of argument in *Gray* v. *Fidler* were listed in the tenancy agreement in a list of "landlord's fixtures and fittings"; some of the articles in that list were clearly fixtures and fittings, others were admittedly movable furniture. But the list contained also fitted wardrobes with mirrors, fitted bed cupboards and beds, electric fittings with shades and lamps, a mirror and shelf over the bathroom wash-basin and a hot water towel rail. All these articles were not only fixed to the fabric of the flat; they were designed and built to be so fixed. The County Court Judge held them nevertheless to be furniture. A majority of the Court of Appeal, consisting of MacKinnon and du Parcq, L.JJ., held all these articles, with the exception only of the towel rail, to be furniture; Lord Greene, M.R., in a dissenting judgment, expressed the view that none of them was furniture.

The basis upon which the majority of the Court founded their decision was that "furniture" must be understood in its ordinary popular sense, and that "furniture" in its ordinary meaning is not limited to movable articles. Although the Oxford English Dictionary was quoted to the effect that furniture is "Movable articles . . . in a dwelling-house, place of business or public building", MacKinnon, L.J., expressed the view that it is not essential that furniture, within the popular meaning of the word, should be movable, and that articles do not pass out of the popular meaning because they are fixed by a nail or screw to the wall or floor. He accordingly held that the beds and fitted wardrobes were furniture. He rejected the test of whether they would pass under a devise of the realty or not, the question whether they were technically fixtures or not being in his view irrelevant. The simple and sole test, in the view of MacKinnon, L.J., is whether the articles come within the ordinary and popular meaning of the word "furniture". The same view was expressed by du Parcq, L.J., when he said that in the end the Judge must answer, as a juryman, the question: "Which of these articles ought to be described, in a popular sense, as furniture?" Later in his judgment the learned Lord Justice says: "If a thing which would ordinarily be regarded as an article of furniture has been attached to a structure, and can be detached and moved and still be recognisable as the same article of furniture, then, in my opinion, furniture it is. The word 'movable' is necessary to the definition only because the ordinary man does not describe as furniture things which are in fact part of the structure of the house (for example, most, if not all, mantelpieces). His reason is not that they are 'fixtures', but that they are really a part of the building".

It will be seen that the view which the majority of the Court of Appeal has expressed is not that fitments in the nature of fitted furniture are necessarily to be regarded as furniture, but that the mere fact that they are fixed does not exclude them from the category of "furniture", it being a question of fact in each case for the Judge to decide whether they come within the ordinary popular meaning of the word.

Presumably the articles the subject of discussion in *Gray* v. *Fidler* were of such design and construction that, in the phrase of du Parcq, L.J., when detached and moved they would be still recognisable as the same articles of furniture. This is of course true of many articles of fitted furniture, but there are others which when detached and moved would not be recognisable

as an article of furniture at all. Take, for example, a "fitted wardrobe" which consists of a convenient corner of the brickwork equipped with the internal fittings of a wardrobe and fitted with a door. Detach this and one has merely a door, some hooks and a rail. The majority decision of the Court appears to mean, not that this is furniture, but that the Judge must consider whether as a fact it comes within the ordinary meaning of the word. It seems fairly clear that no Judge would be likely to regard such a collection of disjointed articles as an article of furniture. Other articles which invite consideration in the light of the Court of Appeal decision are such fitments as, for example, a fitted "dressing-table" consisting of a wooden portion with perhaps no legs at all, being bracketed on to the wall, or perhaps front legs only and none at the back, no back to it, and a separate mirror mounted on the wall. Sever this and we have an article which will not stand up, has no mirror mounted on it, and which it would be difficult to recognise as the same article of furniture. *Gray* v. *Fidler* does not compel the Judge to regard this as furniture; what the case decides is that he must view the article from the factual angle and consider whether it is so recognisable as the article of furniture whose functions it serves as to come within the popular sense of the word "furniture". The possibility of it being "furniture" is not automatically ruled out by the fact that it is fixed to the fabric of the house. Even the fact that the article has no back to it does not preclude it from being "furniture"—in *Gray* v. *Fidler* the bed-cupboards had no backs to them, though the wardrobes had.

It is necessary to turn now and consider the minority view expressed in the dissenting judgment of Lord Greene, M.R. In the view of the learned Master of the Rolls, the paragraph dealing with furnished lettings, namely, section 3 (2) (b) of the Act of 1939, assumes the existence of two distinct kinds of subject-matter, namely, (1) a dwelling-house, and (2) matters distinct from the dwelling-house—namely, board, attendance and the use of furniture. The rent is severed into two elements, one of which is referred to the dwelling-house and the other to matters distinct from the dwelling-house. If the tenant enjoys the use of a thing *ipso facto* under the demise of the dwelling-house, that use is included in that element in the rent which is referable to the dwelling-house. The test, according to the Master of the Rolls, is: "Did they pass by the demise itself, or are they articles the use whereof is enjoyed by the tenant under a distinct contract of hiring?" Articles which have been so attached to the fabric of the house as to become fixtures pass by the demise itself, as they would upon a conveyance of the house: there is no need for a distinct contract of hiring to provide for their use by the tenant. Lord Greene very pertinently points out that if this view be wrong most modern houses with fitted kitchen cupboards would have to be regarded as, to that extent, let with the use of furniture, and at the time when business premises were within the Acts few shops would have been subject to control, since it is very common for shops to be let with fitted cupboards, counters, etc.

A further point in which Lord Greene, M.R., differs from his colleagues is that in his opinion it is material to consider the language of the document to see whether the parties have treated the articles as part of the house itself or as furniture distinct therefrom. In this case the parties had listed the articles under discussion as "fixtures" and "fittings", not as furniture. This was an additional reason why, in the view of the Master of the Rolls, rent attributable thereto could not be said to be in respect of the use of furniture, since the parties themselves had negatived any intention to treat the articles as furniture but had regarded them as attached to the house itself.

It will be seen that whereas MacKinnon and du Parcq, L.JJ., have focused attention upon the question of what may fairly be said to be com-

prised within the expression "furniture", Lord Greene, M.R., has based his argument upon a close analysis of the words "let at a rent which includes payments in respect of the use of". It is not proposed here to weigh up the one line of reasoning against the other, since the important thing is the fact that a majority of the Court have pronounced in favour of construing the word "furniture" in the broad popular sense. One aspect of the matter which does not appear to have received much prominence is, however, worthy of comment. It may reasonably be suggested that the broad policy of the Acts in their provisions relative to furnished lettings is to place no obstacle in the way of the landlord recovering possession where what he has let is not merely just a dwelling-house, but a dwelling-house together with some appreciable quantity of those domestic articles which make a home. The basic idea seems to be that there may be a statutory tenant of a man's house, but not of the odds and ends which constitute a home and its domestic comforts. This, at any rate, seems to have been the broad intention of the Legislature, though of course the language often falls short of the root intention and has to be construed according to the words used. If, however, this really was what Parliament had in mind in excluding furnished lettings from the major provisions of the Acts, then it does seem foreign to the purpose to exclude a house merely because it happens to be lavishly equipped with modern space- and labour-saving devices in the shape of built-in fitments replacing movable furniture.

(Woodfall, 24th edition, p. 349.)

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4. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Income tax—building let in different apartments—tax collected from occupiers—landlord's right of deduction against superior landlord.—Thorley v. *Payne,* [1943] 1 K. B. 306, raised some interesting questions as to the effect of the new methods of collecting Schedule A tax authorised, in certain cases, by section 12 of the Finance Act, 1941, and the First Schedule to that Act. The defendant was the lessee of a building under a lease granted by the plaintiff. The building was let out in different apartments, and the Schedule A tax was accordingly assessable upon the lessee as landlord, as provided by rule 8 (c) of No. VII of Schedule A. Tax had been left unpaid by a former landlord, and substantial arrears had accumulated. In the exercise of his powers under Part III of the First Schedule to the 1941 Act, the Collector of Taxes had required the occupiers to make payments to him instead of paying rent to the landlord and had by these means recovered part of the arrears. A payment on account of the arrears had also been made by the defendant personally. On being sued for rent due under the lease, the defendant claimed to be entitled to set off both the arrears of tax paid by her direct and also those collected from her tenants by the interception of rents. Rule 7 of No. VIII of Schedule A authorises a tenant occupier who has paid rent which ought to have been paid by a former tenant or occupier to recoup himself by deducting the amount so paid from any subsequent payment of rent to his landlord. The defendant sought to avail herself of this rule, but it was held, as was to be expected, that she was not an occupier within the meaning of the rule. She then fell back upon rule 9 of No. VIII, which provides that where tax has been charged

upon a landlord under rule 8 (c) of No. VII, and, in default of payment by the landlord, has been levied upon the occupier, the tax is to be allowed out of the next or any subsequent payment on account of rent. It is not expressly stated in the rule that the rent referred to is rent payable by the occupier to the landlord, and the defendant contended that it extends to rent payable by the occupier's landlord to a superior landlord, so as to enable an intermediate landlord to pass on the deduction. This contention also was rejected by Tucker, J., who held that, read in its context, rule 9 must be construed as operating only as between an occupier and his landlord. The effect of section 12 (4) of the Finance Act, 1941, is to repeal so much of rule 8 (c) of No. VII of Schedule A as authorises the levying of tax on the occupiers in case of default by the landlord of a building let out in different apartments, and to substitute the interception of rents provided for by Part III of the First Schedule to the Act. As pointed out by the learned Judge, it is clear that the 1941 Act, while expressly authorising an occupier to pass on the burden of any payments which he has been required to make under Part III of the First Schedule, does not give the landlord any corresponding right against his superior landlord.

It remained to consider the defendant's right of deduction under rule 4 of No. VIII of Schedule A, which, as amended by section 39 of the Finance Act, 1927, authorises an intermediate landlord to deduct tax at the standard rate for the year in which the amount payable becomes due, but subject to the proviso that he shall not deduct more than the amount of tax charged in respect of the property and actually paid by him. Following *Re Hayman, Christy and Lilly, Ltd.* (*No.* 2), [1917] 1 Ch. 545, the learned Judge held that the deduction was not limited to tax paid for the year in which the rent fell due and could be justified by reference to payment of tax in arrear. He further held that where an intermediate landlord's rents have been intercepted by the Revenue authorities under Part III of the First Schedule to the 1941 Act, this is equivalent to actual payment by him for the purposes of rule 4.

Surtax—testamentary annuity—income of estate insufficient—capital of estate less than actuarial value—payments to annuitant.—A testator had charged his residuary estate with a tax-free life annuity to his widow and also with an annuity to another person. The income of the residuary estate was insufficient to answer the annuities; and its capital value was found to be less than the actuarial values of the annuities at the date of the testator's death. The annuitants were accordingly entitled to have the residuary estate divided between them in shares proportionate to the actuarial values of their respective annuities. In the interval which elapsed before the insufficiency of the residuary estate was ascertained, a series of payments had been made to the annuitants. Did these payments fall to be treated as payments on account of the annuities, so as to have the character of income in the hands of the recipients? This was the question which arose in *C. I. R.* v. *Lady Castlemaine*, [1943] W. N. 213. It was answered in the negative by Macnaghten, J., who held that the payments must be treated as payments on account of the capital sums to which the annuitants were, in fact, respectively entitled.

After the hearing before the Appeal Commissioners, the Revenue authorities had given notice that they proposed to develop a fresh line of attack by invoking the provisions of Part III of the Finance Act, 1938, with regard to residuary income. The learned Judge declined to deal with this point, leaving it to the Special Commissioners, if they thought fit, to start again with a fresh assessment by reference to residuary income.

Surtax—life interest in trust property—income accumulated during infancy—Trustee Act, 1925, *s.* 31.—In *Stanley* v. *C. I. R.,* [1943] 1 K. B. 717, S. had a vested life interest in certain property. In conformity with section 31 (1) of the Trustee Act, 1925, the income arising during the infancy of S., so far as not applied for his maintenance, had been accumulated by the trustees. On attaining his majority, S. became absolutely entitled to the accumulations, as provided by section 31 (2) of the Act. He was assessed to surtax on the footing that, since his interest was a vested interest, the income of the property, as it arose year by year during his infancy, was his income. The assessments were resisted on the ground that, having regard to the provisions of section 31 (2), above, S.'s interest during his infancy could not properly be treated as a vested interest. Had he died before attaining his majority, the accumulations would not have passed to his next-of-kin as on an intestacy. This is what would have happened under the law as it stood before the enactment of the Trustee Act, 1925, but, by virtue of section 31 (2) of that Act, S.'s death before attaining his majority would have resulted in the accumulations going as an accretion to the capital of the trust property. In the light of this change in the law, it was argued that S.'s interest in the income during his infancy was of the nature of a contingent interest. This contention failed. Macnaghten, J., held that the true view was not that S. was entitled to the income contingently on his attaining the age of twenty-one, but that the income was his income unless and until he died before attaining that age.

Surtax—arrangement constituting a settlement—property comprised in the settlement—Finance Act, 1938, *ss.* 38 *and* 41.—Reversing the decision of the Appeal Commissioners and of both the Courts below, the House of Lords has decided in favour of the taxpayer in *Chamberlain* v. *C. I. R.,* [1943] W. N. 149, which raised an important point as to the application of the words "income arising under the settlement from property comprised in the settlement" in section 38 (2) of the Finance Act, 1938. This is the sub-section which provides, briefly summarised, that where a settlement is revocable, and the exercise of the power of revocation may result in the settlor, or the settlor's wife or husband, becoming beneficially entitled to the capital or income of the settled fund, "any income arising under the settlement from the property comprised in the settlement . . . shall be treated as the income of the settlor and not as the income of any other person". In *Chamberlain's Case,* above, the appellant taxpayer had (1) transferred certain shares in a trading company in which he was interested to an investment company controlled by himself; (2) executed a settlement by which a sum of money was paid to trustees upon trusts for the benefit of his wife and children; (3) caused the trust fund to be invested in shares in the above-mentioned investment company; (4) caused the capital structure of the company to be altered by the division of the ordinary shares into five classes, one class consisting of the shares held by the trustees of the above-mentioned settlement, and the other four classes being destined to be disposed of as next appears; (5) executed four more settlements by which sums of money were paid to trustees upon irrevocable trusts for the benefit of his four children; (6) caused the trust funds to be invested in ordinary shares of the company; (7) caused the company's articles to be altered so as to enable the four classes of shares held by the trustees of the above-mentioned four settlements to be redeemed on payment of the capital paid or credited as paid on the shares.

These are the main outlines of the scheme. The appellant had been assessed to surtax under section 38 (2) of the Finance Act, 1938, on the

footing, first, that the operations just described, taken as a whole, constituted an "arrangement" amounting to a settlement within the meaning of section 41 (4) (b) of the 1938 Act, and, secondly, that "the property comprised in the settlement" consisted of the whole assets of the investment company, *i.e.*, the shares transferred to it by the appellant, with the result that the whole of the company's income must be treated as his income for the purposes of surtax. Having failed at every other stage, the appellant succeeded in the House of Lords, which came unanimously and unhesitatingly to the conclusion that nowhere was it possible to find a settlement of the assets of the investment company. However true it might be that the series of transactions in which the appellant had engaged were but links in a chain, the fact remained that the only property which could properly be said to have been settled was the property consisting of the various shares of money paid to the respective trustees of the five settlements executed by the appellant, and now represented by shares in the company—not the whole of its shares, for the appellant retained a substantial interest. It followed that it was with the income arising under these five settlements, taken separately, that the Crown had had to deal, if it sought to apply section 38, and not with the income arising from a notional settlement comprising the company's assets as a whole. The five settlements were, however, immune from attack, since under one of them no income had arisen, while in the case of the other four there was clearly no power "to revoke or determine any provision thereof". On the subject of "composite settlements" generally, in relation to section 38, the speeches in the House of Lords contain some instructive observations, which have a bearing on such decisions as those in *C. I. R.* v. *Payne* (1940), 23 T. C. 610, and *C. I. R.* v. *Morton* (1941), 20 A. T. C. 5.

Income tax—profits of farming—exemption from Schedule D—total annual value—land let for grazing—Finance Act, 1941, *ss.* 10, 11.—Section 11 of the Finance Act, 1941, exempted from compulsory assessment under Case I of Schedule D a farmer whose farm and market garden land had an annual value not exceeding £300. Section 28 (1) of the Finance Act, 1942, substitutes £100 for £300. The question which arose in *C. I. R.* v. *Forsyth Grant,* [1943] Tax Leaflet 1239, related to the computation of total annual value in a case in which the respondent, while himself attending to the fencing and manuring of the whole of his grazing lands, was accustomed every season to auction the grazing rights on part of them. Did the annual value of the lands which, by agreement with the respondent, were grazed by another person, fall to be included in the computation of total annual value? The Court of Session decided, by a majority, that it did. There were two points to be considered. Were the grazings in question occupied by the respondent? If so, were they occupied by him for the purposes of husbandry within the meaning of section 10 (2) of the 1941 Act, which, echoing the language of the introduction to the rules of Schedule B, defines "farm land" as "land wholly or mainly occupied for the purposes of husbandry . . ." ? As to whether the respondent was the occupier, it was held that it was impossible to say that he was not without running counter to the decision in *Donald* v. *Thompson* (1922), 8 T. C. 272. In that case the Court of Session took the view that the profits of seasonal grazings rented by X from Y were not covered by X's Schedule B assessment, since he was not the occupier of the lands grazed by him. The Court decided, by necessary implication, that the lands were occupied by the grantor of the grazing rights, since they were clearly not without an occupier. Applying this decision to *Forsyth Grant's Case,* above, the Court of Session took the

view that it was bound to treat the respondent as the occupier, there being no reason for distinguishing occupation for the purposes of Schedule B from occupation for the purposes of the relevant provisions of the 1941 Act. As to whether the let grazings were occupied by the respondent for the purposes of husbandry, the view taken by the majority of the Court (Lord Moncreiff dissenting) was that on the footing that the respondent was the occupier, his occupation must be considered to be for the purposes of husbandry, and that it made no difference that the way in which he derived profit from the growing of herbage was by disposing of the right to use that herbage instead of using it himself.

Income tax—profits of farming—exemption from Schedule D—total annual value—unrestricted letting—Finance Act, 1941, *ss.* 10, 11.—The *ratio decidendi* in the case just noticed—*C. I. R.* v. *Forsyth Grant*—is clearly brought out by the decision in favour of the taxpayer in *Mitchell* v. *C. I. R.,* [1943] T. R. 241. The appellant had let part of his farm land to a tenant for 364 days in each year, this peculiar feature of the tenancy being introduced with a view to excluding claims under the Agricultural Holdings (Scotland) Acts. The lands were, in fact, used by the tenant solely for pasturage, but there were no restrictions on their use. There was no evidence of any expenses relating to the lands being borne by the landlord. It was clear that there was a material distinction between the facts of this case and those of *Forsyth Grant's Case,* above, and the Court was unanimously of opinion that the lands which were the subject of the letting should be excluded in computing the total annual value of the appellant's farm land for the purpose of ascertaining whether he was exempt from assessment under Schedule D. The letting was for less than a year, but it was none the less a letting of the lands themselves as distinct from a disposition of the right to graze them. It was held to be immaterial that the appellant had, in fact, been assessed to Schedule A tax as the occupier.

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5. *DEATH DUTY CASES.*

By LEONARD STEIN, Barrister-at-Law.

Estate duty—death on war service—remission of duty—persons benefiting by remission—Finance Act, 1900, *s.* 14—*Death Duties (Killed in War) Act,* 1914, *s.* 1—*Finance Act,* 1918, *s.* 44—*Finance Act,* 1924, *s.* 38.—By section 14 of the Finance Act, 1900, as amended and amplified by a series of subsequent enactments, certain concessions are made in respect of the death duties payable on the death of a member of the armed forces who dies on war service. These concessions relate to the duties leviable in respect of property passing upon the death of the deceased to certain members of his family, who may conveniently be referred to as "the specified relatives". The question which arose in *Re Joel,* [1943] 1 Ch. 310, was as follows: J, a member of the armed forces, died on war service. By his will he bequeathed his residuary estate, as to two-fifths to A, as to two-fifths to B, and as to the remaining one-fifth to C. A and B were within the category of "specified relatives"; C was not. In addition to the residuary bequest, the deceased bequeathed specific legacies to A and B. There was also a pecuniary legacy to another "specified relative"—D. In these circumstances, there was an admitted claim to a substantial remission of estate and other death duties. For whose benefit was the remission of estate duty to enure? Its effect was to increase the amount of the residuary estate

available for distribution. Was the matter to rest there, with the result that A, B and C would benefit in proportion to their interests in the residue, notwithstanding that C was not a " specified relative " ? Or was the benefit of the remission to be restricted to " specified relatives ", and, if so, was it to be restricted to " specified relatives " who were residuary legatees, *viz.*, A and B, or could a share in it be claimed by the " specified relative ", D, who was a pecuniary legatee? It was held that, whatever might have been the intentions of the Legislature, the statutory enactments, correctly construed, left no escape from the conclusion that the benefit of the remission rested where it fell, or, in other words, that the remission simply increased the net amount of the residue and accordingly enured for the benefit of the residuary legatees, irrespective of whether or to what extent they were " specified relatives ". It followed that, in the case under appeal, A, B and C, of whom, as stated above, the first two were in the category of " specified relatives " and the third was not, must share the benefit of the remission in proportion to their respective interests in the residue. A case can be imagined in which there are " specified relatives " to whom property passes on the death, but the residue goes entirely to persons not within that category. The anomalous result would be that the remission claimable by reference to the interests of the " specified relatives " would not enure for their benefit but solely for the benefit of persons who were not " specified relatives " and not necessarily relatives at all. It was suggested as the only satisfactory explanation of this remarkable state of affairs that Parliament must have overlooked the distinction between estate duty on the one hand and legacy duty and succession duty on the other and omitted to notice that estate duty on the free personal estate falls upon residue.

Estate duty—settlement of shares—option of exchange at par value for other investments—whether deceased competent to dispose of option—Finance Act, 1894, *s.* 2 (1) (a).—In *Tawse's Trustees* v. *C. I. R.*, 22 A. T. C. 119, the deceased had joined with his daughter in a settlement by which each of them transferred property to trustees upon trusts for the benefit of the daughter and her issue. The property contributed by the deceased included a part of his shares in a private company in which he had a substantial interest. The trust deed provided that the whole or any part of these shares should, on the demand of the deceased, be re-transferred to him by the trustees in exchange for other investments of a value equal to the par value of the shares withdrawn. The deceased never exercised the option thus conferred upon him. At the time of his death, the market value of the shares was considerably in excess of their par value. Estate duty was claimed on the difference between the market value and the par value, the property in respect of which the claim was made being described in the assessment as " property consisting of the right or option reserved by the deceased to have the . . . shares reconveyed to him ". On the hearing of the appeal, it was intimated by counsel for the Crown that they did not propose to argue either that there was a passing of the property under section 1 of the Finance Act, 1894, or that there was a reservation of interest bringing the case within section 2 (1) (c). They took their stand on the contention that the property was property of which, at the date of his death, the deceased was " competent to dispose " within the meaning of section 2 (1) (a). It appeared, however, that what they were really contending was that the deceased was competent to dispose, not of the option, but of the shares themselves. The Court declined to entertain an argument on these lines, holding that, having proceeded throughout on the footing that the property to be considered was the option, the Crown must start again with a fresh assessment if it desired to claim duty in respect of

an entirely different item of property, *viz.*, the shares. Accordingly, the sole question before the Court in this appeal was whether the deceased was, at his death, competent to dispose of the option. This, in turn, raised the question whether the option was assignable or transmissible. Applying to the settlement the principle propounded, in relation to testamentary directions, in *Skelton* v. *Younghouse,* [1942] A. C. 571, the Court held that the answer depended on the true construction of the trust deed in the light of any circumstances properly admissible in evidence. The conclusion reached was that this particular option was neither assignable nor transmissible, but was purely personal to the deceased, from which it followed that the option was not property of which the deceased was, at his death, competent to dispose. Whether duty was claimable, either under section 2 (1) (a) or otherwise, in respect of the shares was left undecided. The Crown had made a false start by electing to claim duty in respect of the option, and the Court refused, as has been seen, to allow it to shift its ground.

Estate duty—life assurance policies—whether kept up for benefit of a donee—Finance Act, 1894, *s.* 2 (1) (c).—The combined effect of section 11 of the Customs and Inland Revenue Act, 1889, and section 2 (1) (c) of the Finance Act, 1894, is that, for estate duty purposes, the property deemed to pass on the death of the deceased includes " money received under a policy of insurance effected by any person . . . on his life, where the policy is wholly kept up by him for the benefit of a donee . . ., or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit ". In *Attorney-General* v. *Lord Devonport's Trustees,* 21 A. T. C. 297 (see *The Conveyancer,* March, 1943, at p. 164), Wrottesley, J., held that in order to satisfy the words " kept up by him ", it was not necessary to show that the deceased had paid the premiums himself. It was enough that he had ensured their payment by providing the wherewithal and declaring appropriate trusts. This decision has now been affirmed by the Court of Appeal (Luxmoore, L.J., dissenting)—[1943] T. R. 173.

The deceased had assigned to trustees certain policies on his life and had also transferred to them certain investments. The trusts relating to the policies are, for the present purpose, immaterial. As to the investments, the income was to be applied to the payment of the premiums on the policies, and, subject thereto, for other purposes. Various interests in the trust property were created by the exercise of a power of appointment reserved to the settlor and by a series of other transactions, but all these interests remained subject to the payment of the premiums on the policies. On the death of the settlor, estate duty was claimed on the policy moneys on the ground that, although the deceased had not paid the premiums himself, the policies had been wholly kept up by him within the meaning of the statutory provisions. A majority of the Court of Appeal (Scott and MacKinnon, L.JJ.), rejected the contention that the meaning of the words " kept up by him " was fixed and limited by the later words, " the premiums paid by him ", so as to restrict the charge of duty under section 2 (1) (c) to cases in which the deceased had made the payments direct out of his own pocket. It was held that the words " kept up " must be understood in their ordinary common-sense meaning, and that it made no difference whether the deceased had kept up the policies directly by paying the premiums himself or indirectly by providing for and ensuring their payment through the medium of a trust. The Court gave leave to appeal, and the case may go further.